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July 22, 2011

VIA ELECTRONIC FILING

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Docket No. NOR 42128, South Mississippi Electric
Power Association v. Norfolk Southern Railway Company

Dear Ms. Brown:

830655

Enclosed for filing in the above-referenced proceeding is Complainant South Mississippi Electric Power Association's First Motion to Compel Discovery. Please note that Complainant is requesting expedited consideration of this Motion.

Thank you for your attention to this matter.

ENTERED
Office of Proceedings

JUL 22 2011

Part of
Public Record

Enclosures

Sincerely,



Kelvin J. Dowd
An Attorney for Complainant

cc: Counsel for Defendant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42128

Complainant, South Mississippi Electric Power Association (“SMEPA”), pursuant to 49 C.F.R. Part 1114.31, hereby moves the Board for an order compelling Defendant, Norfolk Southern Railway Company (“NS”), to provide complete answers to Interrogatories, and produce documents in response to Requests for Production of Documents, propounded by SMEPA in this proceeding and objected to by NS on grounds that they allegedly seek the disclosure of Sensitive Security Information (“SSI”), within the meaning of 49 C.F.R. Parts 15.5 and 1520. The requested order should be granted because (1) the data and documents in question undeniably are relevant to application of the *Coal Rate Guidelines* in this case, as they routinely are produced by railroad

defendants and used by complainants in maximum rate proceedings; and (2) the data at issue¹ are not SSI.

Over SMEPA's objection and reservation of rights, the matter of NS' claims regarding SSI became the subject of informal discussions among staff of the Board, FRA and the Transportation Security Administration ("TSA"). Based on representations by all three (3) that NS' objections would be resolved and production of the subject data cleared under the terms of the Protective Order governing this case within one to two weeks after the agencies finished their discussions in early April, SMEPA refrained from moving to compel production under the Board's rules in deference to the more expeditious conclusion promised at the time. However, more than *three months* now have passed since those assurances were given, and NS has yet to produce the essential traffic data at issue. In accordance with its exclusive jurisdiction over this proceeding, it is the Board's responsibility now to end the unjustified delay and direct NS to do so.

Moreover, given the centrality of the data at issue to the development of a stand-alone traffic group and other basic evidentiary elements of its case under the *Guidelines'*

¹ NS' SSI claims related primarily to three (3) categories of discovery requests: (1) traffic and event records for movements of Toxic By Inhalation and Poisonous by Inhalation commodities, explosive commodities and radioactive material (collectively referred to herein as "TIH"); (2) security and routing plans and protocols developed by NS at the request of the Federal Railway Administration ("FRA"); and (3) NS' Positive Train Control ("PTC") Implementation Plan. See Exhibit No. 5 at 4-7. SMEPA's discovery requests do not seek documents and data in the second category, and SMEPA stipulates to the acceptability of production by NS of redacted versions of its PTC Plan, which the carrier acknowledges do not contain SSI. The relief sought by this Motion, therefore, relates to train and car event data and traffic records which include information on TIH movements.

stand-alone cost constraint, and in light of the procedural schedule that has been adopted by the Board and the irreparable harm that delay already has caused SMEPA and its members, SMEPA respectfully requests that this Motion be accorded expedited consideration.

BACKGROUND

SMEPA's Original Complaint seeks the establishment of just and reasonable rates, rules and practices for the transportation of coal by NS from various origins East of the Mississippi River to SMEPA's R.D. Morrow, Sr. Generating Station near Richburg, Mississippi. *Inter alia*, the Complaint pleads that the common carrier rates established by NS for the subject service as of January 1, 2011 in rate quotation NSRQ 65837 are unreasonably high and unlawful under the stand-alone cost constraint of the *Guidelines*. See Original Complaint, ¶ 16-18.²

On January 14, 2011, SMEPA served its First Requests for Admissions, Interrogatories and Requests for Production of Documents ("First Requests") on NS.³ Subsequently, on March 14, 2011, the Board served a decision granting SMEPA's motion for adoption of a procedural schedule, wherein the Board set September 2, 2011 as the due date for the filing of SMEPA's Opening Evidence.

² SMEPA's Complaint also pleads that the challenged rates are unreasonable and unlawful under the *Guidelines'* revenue adequacy constraint.

³ A copy of relevant excerpts from SMEPA's First Requests is attached hereto as Exhibit No. 1.

SMEPA's First Requests included requests for data and documents concerning traffic handled by NS in 2010 over its lines in the several states that SMEPA preliminarily identified as the states through which its hypothetical stand-alone railroad ("SARR") might be projected to conduct operations. These included requests for data commonly referred to as railcar event and train event records, which detail how the freight cars actually handled by NS traveled through its system during the year, and include information concerning the routing of shipments and the transportation activities related to individual trains and/or cars (e.g., origin, destination, interchange locations, switching activity, etc.).⁴ This traffic data has been requested and produced routinely in past proceedings under the *Guidelines*, and form part of the foundation for a complainant's determination of the shippers to be included in a SARR's traffic group, a fact which is not in dispute in this case.⁵ SMEPA also requested production of unredacted copies of documents related to NS' PTC Implementation Plan.⁶

On February 14, 2011, NS served its Responses and Objections to SMEPA's First Request ("Responses").⁷ Therein, NS lodged a general objection to the production of "information and data that is [SSI]...."⁸ However, NS singled out only four (4)

⁴ See Exhibit No. 1, Document Request Nos. 6-8.

⁵ See Exhibit No. 5 at 4 ("NS acknowledges that traffic data (including car event records) are essential to a SAC case....").

⁶ See Exhibit No. 1, Document Request Nos. 74 and 75.

⁷ A copy of relevant excerpts from NS's Responses is attached hereto as Exhibit No. 2.

⁸ Exhibit No. 2 at 3.

Interrogatories and Document Requests that it claimed actually implicated SSI: Interrogatory No. 10 and Document Request No. 26, to the extent that they sought information regarding security plans, and Document Request Nos. 74 and 75, which related to NS' PTC Implementation Plan.⁹ In subsequent discussions with counsel for NS, counsel for SMEPA advised -- and hereby formally confirms -- that the requests for security information regarding rail yard activities are not being pursued, and that SMEPA will deem production of redacted versions of the materials sought in Document Request Nos. 74 and 75 sufficient to satisfy SMEPA's discovery needs in those areas.

However, on March 7, 2011,¹⁰ NS informed SMEPA that it had additional discovery objections predicated on its views regarding SSI. NS took the unprecedented position that essential traffic data -- including in particular the car and train event records requested by SMEPA in its Document Request Nos. 6-8 -- constituted SSI,¹¹ and would not be produced absent prior consideration and clearance by federal agencies other than the Board, including FRA and TSA. SMEPA voiced its opposition to NS' new position, and to the need for any involvement of FRA or TSA in resolving NS' objection.¹²

⁹ Exhibit No. 2 at 15, 35, 61-62.

¹⁰ See Exhibit No. 3 attached hereto.

¹¹ The current regulations governing the designation and treatment of SSI have been in effect since mid-2004. See 49 C.F.R. Part 1520. In the intervening years, numerous cases have been initiated under the *Guidelines*' SAC constraint and proceeded through the discovery phase, several of which are still pending. Prior to NS' action in this case and its contemporaneous action in STB Docket No. 42125, *E.I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.*, no railroad has ever raised an SSI-related objection to the production of traffic data.

¹² See Exhibit No. 4 attached hereto.

However, Board staff entertained a request by NS for an informal conference, which SMEPA participated in and was followed by NS' submission of a written statement of its position, a copy of which is attached hereto as Exhibit No. 5.

As presented at the staff conference and reflected in its written summary (Exhibit No. 5), NS' refusal to produce the requested traffic data was not predicated on any determination by FRA or TSA that such data *was* SSI. Rather, it was based on NS' internal view that because the data included TIH routing information, it *could* be SSI, and therefore purportedly was treated as such by NS management and personnel.¹³ In another unprecedented move, NS requested that Board staff consult with FRA and TSA and "issue a ruling concerning whether and under what conditions NS should produce relevant SSI," and stated unequivocally that it would not produce the admittedly relevant traffic data until it received "clear, coordinated authorization and direction from the responsible federal agencies charged with review and protection of transportation SSI."¹⁴ Over SMEPA's continued objection, the Board staff presiding at the informal conference agreed, and undertook to conduct the requested consultations with FRA and TSA.

On April 7, 2011, Board staff convened a teleconference to brief counsel for the parties on the results of its consultations with the other federal agencies. Board staff reported that TSA did not consider the traffic data in question to be SSI, and that it was not likely to designate it as such in the future. While STB staff reported that TSA was

¹³ See Exhibit No. 5 at 3.

¹⁴ *Id.*

not disposed to issue written confirmation of a non-designation, STB staff offered to endeavor to provide NS with a statement in writing summarizing the substance and outcome of its consultations with FRA and TSA, and affirming the discoverability of the car and train event records under the auspices of the Protective Order entered in this proceeding on January 21, 2011. In a communication that same day, however, NS rebuffed Board staff's offer, stating that "[a]bsent an order from the Surface Transportation Board or express authorization from FRA, TSA, or other agencies...NS will not produce traffic data records for movements" of TIH.¹⁵ Frustrated at the delay that already had been caused by NS' unilateral pronouncements, but at least believing that the matter could be put to rest easily, SMEPA resolved to move at that time for an expeditious Board order compelling production of the subject data. However, another unexpected turn was in the offing.

On or about April 8, 2011, one day after the Board staff teleconference with all parties, representatives of FRA apparently engaged in communications with representatives of NS and the Board -- but conspicuously *not* with representatives of SMEPA -- and were persuaded to take up NS' SSI claims yet again in conjunction with TSA.¹⁶ Again over SMEPA's objection, a meeting was convened and hosted by FRA on

¹⁵ See Exhibit No. 6 attached hereto.

¹⁶ See Exhibit No. 7 hereto. The Exhibit is an e-mail authored by FRA staff counsel, in which she states that "I think I have spoken to everyone on this e-mail regarding the issue of whether certain information being requested in discovery in STB rate cases contains SSI...." The addressees and other recipients of the e-mail include Board staff and representatives of NS, but not representatives of SMEPA.

April 13, 2011, attended by representatives of the parties, Board staff, FRA staff and -- via telephone -- representatives of TSA. After the parties reiterated their positions (including SMEPA's objection to the matter being addressed at all outside the auspices of the instant proceeding) and responded to the agencies' questions, counsel were advised that FRA/TSA would issue a written clarification that the NS traffic data in question could be produced under the governing Protective Order in this proceeding without running afoul of the regulations governing the handling of SSI, and that such clarification would be forthcoming within approximately one week of the meeting.

After two (2) weeks passed with no action by FRA, TSA, the Board or NS, counsel for SMEPA made written inquiry to FRA, seeking information as to the status of the matter. FRA counsel responded the same day, promising action and apologizing for the delay.¹⁷ After another ten (10) weeks passed without production of the relevant data, however, SMEPA made another, more urgent request for action.¹⁸ As of the date of this Motion, SMEPA has not received any response. Significantly, throughout the entire time period in question SMEPA has seen no evidence of any effort by NS -- the party that initiated the controversy -- to expedite its resolution. To the contrary, in a recent submission made in the aforementioned *DuPont* proceeding, NS reiterated its refusal to produce its traffic data until it had received both satisfactory assurances from FRA *and* a

¹⁷ See Exhibit No. 8 hereto.

¹⁸ See Exhibit No. 9 hereto.

formal order from the Board compelling production.¹⁹ Additionally, NS rather ominously implied that production would be delayed even *after* issuance of a Board order, noting the “voluminous” nature of the data and offering only to “begin production as soon as it receives” the assurances it has demanded.²⁰

SMEPA respectfully submits that enough is enough, and hereby seeks an order from the Board compelling immediate production of the NS traffic data in question.

ARGUMENT

The Board’s exclusive jurisdiction over this proceeding fully empowers the Board to provide the relief requested under its established discovery rules, and the case for issuance of an order compelling NS to produce the car and train event and other traffic data sought by SMEPA in its First Requests is clear. The data and documents in question are directly relevant to matters that are central to key issues in this proceeding, and NS’ SSI-based objections are without merit. The instant Motion therefore should be granted. Further, in light of the importance of the subject data from an evidentiary standpoint, SMEPA’s manifest entitlement to its production, and the severe prejudice to SMEPA and

¹⁹ See Exhibit No. 10 hereto. In this document, as in other statements made over the course of this controversy, NS claims that it has not been “authorized” to produce the subject data, clearly implying that it is prohibited from doing so absent some action by FRA and/or TSA. This is a canard which the Board must not accept. The plain fact is that NS has taken the position that it *will not* produce traffic data until its demands are met. It remains at liberty to produce traffic data requested in discovery just as every other Class I railroad defendant in pending and recent rate cases has done.

²⁰ See Exhibit No. 10 at 2.

its constituents that the delay already experienced in this matter has caused, this Motion should be considered and granted on an expedited basis.

1. The Board Has Authority to Grant the Relief Requested

Pursuant to 49 U.S.C. § 10501(b), the Board's jurisdiction over determinations relevant to an adjudication of the reasonableness of NS' rates, rules and practices is "exclusive," and extends to the formulation and application of procedural rules, including rules governing discovery. *See Trailways Lines, Inc. v. I.C.C.*, 766 F.2d 1537, 1546 (D.C. Cir. 1985), *citing Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 524 (1978) and *Laird v. I.C.C.*, 691 F.2d 147, 154 (3d Cir. 1982). In circumstances where the Board's exercise of its broad jurisdiction over rail rate matters involves issues that implicate the overlapping authority of agencies such as FRA and TSA, the recognized rule is that the agencies "coordinate and cooperate with each other as appropriate," with a recognition of one another's roles and expertise. *See CSX Transp. Inc. -- Petition for Declaratory Order*, STB F.D. No. 34662, 2005 WL 1024490, at *4-5 (STB served May 3, 2005). *See also Railroad Ventures, Inc. -- Abandonment Exemption -- Between Youngstown, OH and Darlington, PA*, STB AB-556 (Sub-2X), 2008 WL 1855929, at *6 (STB served April 28, 2008).

In this case, at NS' request and over SMEPA's objection, the Board consulted with FRA and TSA staff regarding NS' claims of SSI status for its traffic data. As reported by Board staff to counsel for the parties on April 7, 2011, the outcome of these consultations was a determination that there would be no SSI designation for the subject data, and that production in discovery under the governing Protective Order would not

run afoul of SSI regulations. After further communications among FRA and Board staff and representatives of NS, a second evaluation yielded a similar result, albeit with a promise of written confirmation of FRA/TSA's conclusions. For reasons unexplained, that which was to be forthcoming within a week has not yet been seen after more than three (3) months. Certainly, ample time has been accorded these agencies to provide input to the Board with respect to the production of admittedly relevant traffic data for evidentiary use. Particularly in light of the inequitable impact of this delay on SMEPA discussed *infra*, the Board has fully discharged any responsibility that it had to "coordinate and cooperate" with the other agencies, and given that there has been no indication that those agencies would oppose a Board directive that the data be produced under the Protective Order, the way should be deemed clear for the Board to resume exercise of its exclusive authority and resolve this discovery dispute.

2. The Traffic Data In Question Is Relevant

A complainant in a maximum rail rate case before the Board is entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. Part 1114.21(a)(1); *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110 (STB served February 17, 2009) at 1-2. No claim has been raised that the NS traffic data in question here is protected from disclosure by virtue of a recognized discovery privilege, and it is not disputed that the data is directly relevant to the determination of SAC under the *Guidelines*. Not only are defendant railroad traffic tapes, car event records and train movement data routinely requested and produced in SAC cases, but NS has acknowledged in this proceeding "that

traffic data (including car event records) are essential to a SAC case,” and has affirmed its recognition of “how important detailed car event data is” to a proceeding such as this.²¹ The sole, alleged basis for NS’ objection to production is its own internal determination that the data might contain SSI.²² The objection is without merit.

3. The Traffic Data Is Not SSI Under Governing Regulations

The stated basis for NS’ decision to withhold production of the subject traffic data and event records is NS’ conclusion that they constitute SSI.²³ However, it is neither NS’ responsibility nor its right to make such a designation, and NS’ internal treatment of or handling procedures for this data has no legal effect on its discoverability. Were the rule otherwise, a defendant in NS’ position routinely could strangle regulatory proceedings by making unilateral claims of SSI status, then sit back and take no action until its demands for outside agency assurances in a form satisfactory to the railroad are met. In point of fact, the question whether material or information constitutes SSI is answered specifically by statute (49 U.S.C. § 114(s)) and federal regulation (49 C.F.R. Part 1520.5). As applied to the data at issue here, these rules show that the traffic data are not SSI.²⁴

²¹ Exhibit No. 5 at 4, 5.

²² *Id.* at 5.

²³ *See* Exhibit No. 3.

²⁴ Courts that have considered the issue have held that even legitimate SSI is not completely outside the scope of discovery, and that redactions and other safeguards can be used to balance security considerations and evidentiary relevance. *See, e.g., Gordon v. Federal Bureau of Investigation*, 390 F. Supp. 2d. 897, 900 (N.D. Cal. 2004). *Cf. United States v. Moussaoui*, 2002 WL 1311736, at *1 (E.D. Va. June 11, 2002)

The provisions of 49 C.F.R. Part 1520.5(b) identify sixteen (16) categories of information and materials that are deemed to be SSI, “[e]xcept as otherwise provided in writing by TSA in the interest of public safety....”²⁵ Of these, five (5) exclusively relate to information or documents issued or prepared by TSA, other federal security authorities or States (49 C.F.R. Part 1520.5 (b)(1)-(3), (5), (12)); three (3) do not apply to railroads at all (49 C.F.R. Part 1520.5(b)(9), (13), (14)); and seven (7) describe information or documents which have not been requested by SMEPA in discovery in this case (49 C.F.R. Part 1520.5 (b) (4), (5), (7) (8), (10), (11), (15)). The only category of SSI that even hypothetically could apply to the NS traffic data at issue here is that set forth at 49 C.F.R. Part 1520.5(b) (16), which provides in full as follows:

(16) *Other information.* Any information not otherwise described in this section that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119. Upon the request of another Federal agency, TSA or the Secretary of DOT may designate as SSI information not otherwise described in this section.

As the plain language of the regulation states, unless information falls into one of the fifteen (15) specific categories previously listed (which the NS traffic data does not), it will only be considered SSI if TSA makes a formal determination to that effect, either *sua*

²⁵ It is indisputable that TSA has not made any written determinations whatsoever with respect to discovery in this case. The absence of any TSA order designating NS’ traffic data as SSI distinguishes this matter from the key facts of the only federal court decision cited by NS in Exhibit No. 5 as supporting its position on non-disclosure. *See Chowdury v. Northwest Airlines Corp.*, 226 F.R.D. 608, 609 (N.D. Cal. 2004) (airline security planning information which was the subject of a “Final Order” issued by TSA “designating certain documents...as sensitive security information” was exempt from disclosure under the SSI rules).

sponte or in response to a request from another agency. If no such determination is made, there is no legitimate basis on which to consider the information to be SSI.

In this case, there has been no written determination by TSA that the raw NS traffic and event data at issue is SSI. Indeed, as summarized *supra*, the parties previously were advised by Board staff that TSA had decided that it would *not* be making such a determination, or issuing any written communication of any kind regarding this matter. Even after FRA was persuaded to take a second look and convened the conference of parties' representatives and agency staff on April 8, no order or writing of any kind emanating from TSA has designated the NS traffic data as SSI. As the data does not fall into any of the fifteen (15) enumerated regulatory categories, and the requisite findings for application of 49 C.F.R. Part 1520.5(b)(16) have not been made, the NS traffic and event data cannot be considered SSI for purposes of discovery in this case.

In the written explanation of the position offered by NS to the Board (Exhibit No. 5), NS referenced a 2005 ruling by FRA that TIH routing information submitted in response to FRA orders would constitute SSI as supporting its claims here. *See Designation of Sensitive Security Information Under 49 U.S.C. §40119(b)*, SSI Order 2005-09-FRA-01 (Sept. 27, 2005). However, at issue there was summary routing information prepared by the railroads at FRA's behest, something which falls squarely within the scope of 49 C.F.R. Part 1520.5(b)(16). Here, by contrast, neither FRA nor TSA has requested that NS submit its traffic tapes and car/train event records for agency review or retention, and neither has made any designation of the raw traffic data as SSI. It also bears noting that there is a vast difference between a summary prepared by a

railroad following a query of its database and an organization of the information -- which theoretically could be understood by a reader with minimal technical knowledge -- and the raw traffic data at issue here, which in the form typically produced is almost completely inscrutable to all but a few outside consultants who are known to the Board, and as to whom no issues of improper information disclosure have been raised in previous cases. Significantly, TSA itself drew this very distinction in explaining certain changes to the SSI regulations which were adopted in November, 2008. In response to commenters' suggestion that TSA deem rail car location and shipping information submitted by carriers and shippers to the agency under 49 C.F.R. Part 1580.103 to be SSI, TSA stated:

The location and shipping information, which carriers are required to maintain and submit, would not be considered SSI. However, once DHS or DOT receives the location and shipping information from the railroad carrier and includes it as part of a broader analysis of the location of rail cars subject to the location reporting requirement, *the compilation, not the raw data, will constitute SSI* under revised §1520.5(b)(12). *Such compilations require greater protection than the information maintained by the railroad carrier for its business purposes* because the release of a compilation of location and shipping information to the public would increase the risk that the compiled information could be used to identify vulnerabilities or to plan an attack on critical rail assets.

Rail Transportation Security, 73 Fed. Reg. 72130, 72146 (Nov. 26, 2008) (emphasis supplied). NS' raw traffic data should be treated in the same fashion.

While NS' internal views regarding the traffic data in issue in the context of SSI regulations are not at all dispositive on the question whether the data actually are SSI, it

is noteworthy that there has been no indication that NS follows the regulatory protocols for handling SSI in connection with its traffic and event records. Rules promulgated at 49 C.F.R. Part 1520.9(a)(2) limit disclosure of actual SSI to persons “who have a need to know,” a term which itself is defined in 49 C.F.R. Part 1520.11. As described therein, a person has a “need to know” when:

- (1) he or she is carrying out federally-directed transportation security activities;
- (2) he or she is in training to perform such activities;
- (3) he or she is supervising individuals who are engaged in such activities;
- (4) he or she is providing technical or legal advice regarding federal security requirements; or
- (5) he or she represents a “covered person” in proceedings regarding these security requirements.

49 C.F.R. Part 1520.11 (a)(1) - (5). There have been no representations made by NS in this proceeding that access to the traffic and event data at issue has been limited to the foregoing persons, and it is reasonable for SMEPA and the Board to assume that it has not. The routing information which NS claims raises SSI concerns likely is known by or has been provided to dispatchers, train crews, central operations planning personnel, in-house counsel, the shippers of TIH themselves, and outside counsel and consultants.²⁶ Indeed, during the April 8 FRA-hosted conference, NS counsel and consultants were

²⁶ As noted *supra*, since 2004 every other railroad that has been a party to maximum rate proceedings under the *Guidelines* has produced its own traffic records containing this information in discovery. These include CSX Transportation in STB Docket No. 42110, *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*; BNSF Railway Company in STB Docket No. 42113, *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Co., et. al.*; and Union Pacific Railroad in STB Docket No. 42127, *Intermountain Power Agency v. Union Pacific Railroad Co.*

conversant with respect to the data at issue in a manner that strongly indicated a prior review of it, and in recent correspondence to SMEPA, NS counsel acknowledged querying the data to extract traffic and operating statistics for the SMEPA trains.²⁷

Traffic routing information is as basic to the day-to-day operation of an actual railroad as it is to the determination of a SARR traffic group. It bears emphasis that the point here is not that NS has failed to comply with regulations applicable to SSI; rather, it is that the scope of access to the subject data in the ordinary course of NS business reflects that the data are not SSI.

**4. The Governing Protective Order Fully
Safeguards the Confidentiality of NS' Traffic Data**

The Protective Order entered by the Board in this proceeding on January 21, 2011 permits NS to designate the subject traffic data as "Highly Confidential." With such a designation, the records only would be available for review by SMEPA's outside counsel and expert consultants "who have a need to know,"²⁸ each of whom must sign (or already have signed) a written undertaking committing to abide by the applicable terms of the Order. These include covenants of non-disclosure to unauthorized persons (essentially anyone other than outside counsel or consultants), and strict obligations to protect the security of the designated information. Research reveals no published cases finding an unauthorized disclosure by a complaining shipper's counsel or expert witnesses of Highly

²⁷ See Exhibit No. 11 hereto, at 2.

²⁸ See Order served January 21, 2011 at 3.

Confidential traffic data produced by a railroad in a proceeding under the *Coal Rate Guidelines*.

Because it is so central to the development of evidence under the stand-alone cost constraint, the NS traffic data will be reflected in various forms in SMEPA's Opening and Rebuttal Evidence. Under a Highly Confidential designation, however, that data must be filed with the Board under seal, and must be redacted from the version of SMEPA's evidence that is required to be publicly available. Thus, even if the raw traffic data is rendered by SMEPA's experts in a form more understandable to a reader, the only permitted "readers" will be outside counsel and consultants for NS and members of the Board and Board staff. Upon conclusion of this proceeding, records designated Highly Confidential either must be returned to NS, or destroyed.

The restrictions on disclosure of information designated "Highly Confidential" under the Board's Protective Order are functionally equal to the regulations prescribed for the handling of SSI,²⁹ such that even if the NS traffic data *were* SSI (which, as shown, they are not), their use as evidence in this case would comport with those requirements. The Board's Protective Order conditions are more than adequate to ensure that there is no realistic risk of improper disclosure of the contents of NS' traffic tapes and train/car event and movement records.

²⁹ See 49 C.F.R. Part 1520.9(a).

5. Expedited Consideration of this Motion Is Warranted

SMEPA and its members already have been irreparably harmed by the months-long delay that has resulted from NS' SSI objection, and will be further harmed until the traffic data at issue is produced. The NS rates under challenge in this proceeding are dramatically higher than the rates paid by SMEPA prior to the start of common carrier service on January 1, 2011, and the burden of the resulting higher generation fuel costs falls on SMEPA's members' ratepayers, who are among the lowest income residents of one of the nation's most economically disadvantaged states. While SMEPA would be entitled to reparations upon the successful conclusion of this case, Board regulations³⁰ prescribe interest on the principal reparations based on 91-day Treasury bill rates, which have been well below 1% for many months and are not projected to rise much higher in the foreseeable future. In contrast, SMEPA's current cost of funds exceeds 5%,³¹ and NS' most recent published return on investment was over 7.6%.³² The relevant spreads show both that SMEPA is irreparably harmed by delay, and that NS profits from it, as SMEPA never will be made whole for the full value for the increased transportation costs under the challenged rates, and NS will never have to return the full value of its increased revenues. Against these facts, continued delay in the production of essential traffic data due to NS' SSI objection borders on the unconscionable.

³⁰ See 49 C.F.R. Part 1141.

³¹ See Exhibit No. 12 hereto.

³² *Railroad Revenue Adequacy -- 2009 Determination*, STB Ex Parte No. 552 (Sub-No. 14) (STB served November 10, 2010).

The procedural schedule that governs this case sets September 2, 2011 as the due date for the submission of SMEPA's Opening Evidence. As NS acknowledges, car and train event records and other traffic data "are essential to a SAC case,"³³ as they provide part of the foundation for the identification of a SARR's traffic group. Selection of a traffic group, in turn, is one of the first key steps in the assembly of a case under the SAC constraint, as the design, capital requirements and operating plans for the SARR all depend on the composition of the traffic group.

Not only is prompt production of traffic data necessitated by its basic role in the SAC analysis, but the complexity of the data virtually assures that once it is produced, follow-up inquiries and exchanges between the parties also will be needed to render the data in a useable evidentiary form. These exchanges, and the supplemental explanations and information production that usually result, necessarily consume time as well. The delay experienced thus far virtually assures that a modification of the exiting procedural schedule will have to be sought, though the extent of any required extension of filing dates cannot be known until the NS traffic data is produced and analyzed. However, taken together with the clear case for compelled production of the traffic data in issue, these factors strongly support expedited consideration of this Motion.

³³ Exhibit No. 5 at 4.

CONCLUSION


For the reasons set forth herein, the Board should consider this Motion on an expedited basis, and thereupon issue an order compelling NS to immediately produce all data and documents which are being withheld based upon its SSI claim.

Respectfully submitted,

SOUTH MISSISSIPPI ELECTRIC POWER
ASSOCIATION

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Dated: July 22, 2011

EXHIBITS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**SOUTH MISSISSIPPI ELECTRIC
POWER ASSOCIATION**

Complainant,

v.

**NORFOLK SOUTHERN RAILWAY
COMPANY**

Defendant.

Docket No. 42128

**COMPLAINANT'S FIRST REQUESTS
FOR ADMISSIONS, INTERROGATORIES,
AND REQUESTS FOR PRODUCTION OF
DOCUMENTS TO DEFENDANT
NORFOLK SOUTHERN RAILWAY COMPANY**

Complainant South Mississippi Electric Power Association ("SMEPA"), pursuant to 49 C.F.R. Part 1114.30, hereby submits its First Requests for Admissions, Interrogatories, and Requests for Production of Documents to Defendant Norfolk Southern Railway Company ("NS").

Responses to SMEPA's Requests for Admissions, answers to Interrogatories, and copies of documents responsive to SMEPA's Requests for Production should be delivered to the offices of Slover & Loftus LLP, 1224 Seventeenth Street, N.W., Washington, D.C. 20036, within thirty (30) days from the date hereof,

unless otherwise agreed by the parties. SMEPA is prepared to cooperate with Defendant to facilitate the expeditious production of documents with the minimum practical burden.

I. DEFINITIONS

The following defined terms are used herein:

1. “Challenged Rate(s)” means the rate(s) for common carrier rail transportation service that are the subject of SMEPA’s Complaint in this proceeding, including any such rate(s) that may be established after the date hereof.
2. “Coal train” means any train that transports primarily loaded or empty coal cars, including a mine gathering or distribution run, a train carrying coal cars for more than one customer, a train carrying coal cars from more than one origin to a single or more than one destination, and a unit train in which all cars in the train move between a single origin and a single destination on one bill of lading or other shipping document.
3. “Defendant” means NS as defined in this section.
4. “Destination” means SMEPA’s R.D. Morrow, Sr. Generating Station (“Morrow”), a coal-fired facility located near Richburg, Mississippi.
5. “Distributed power” means a train configuration in which one or more active locomotives are positioned at the front of the train and one or more active locomotives are positioned at an intermediate point in the train and/or at the rear of the train, with the intermediate or rear locomotives remotely controlled from the lead locomotive on the train.

6. “Document(s)” means all writings or visual displays of any kind, whether generated by hand or electronic means, including, without limitation, photographs, lists, memoranda, reports, notes, letters, electronic mail, phone logs, contracts, drafts, workpapers, computer print-outs, electronic data, telecopies, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses, evaluations, statistical records, proposals, treatments, outlines, any electronic or mechanical records or representations (including physical things such as, but not limited to, computer disks or drives), and all other materials of any tangible medium or expression, in NS’s current or prior possession, custody or control. A draft or non-identical copy is a separate document within the meaning of this term.

7. “Geocoded” means process or object data associated to an entity which is linked to a specific location or an array of locations on the Earth’s surface through a standard geographic coordinate system.

8. “Geographic Coordinates” means latitude and longitude coordinates (in decimal values, with no decimal value truncation) associated to a named and standard geographic coordinate system, such as “North American Datum of 1927.”

9. “Identify,” when referring to a document, means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and/or recipient(s).

10. “Identify,” when referring to information, means to list or produce documents containing the specified information.

11. "Intermodal Train" means a freight train that consists of any combination of roadrailer equipment, double-stack or pedestal flat cars, and flat cars equipped for TOFC, COFC, multi-level auto-rack or auto frames.

12. "Local Train" means "Way train" as used in NS's R-1 Annual Report to the STB.

13. "NS" means Norfolk Southern Railway Company, its present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessor, parent and/or holding companies, subsidiaries, or any of them, and all other persons acting (or who have acted) on its behalf.

14. "NS Corp" means the Norfolk Southern Corporation, parent to NS.

15. "Origins" means the mines and/or coal loadout facilities specifically identified in Paragraph 11 of SMEPA's Complaint and all mines and/or coal loadout facilities located within the rate districts identified in Paragraph 11 of SMEPA's Complaint.

16. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions or other legal entities, as the case may be.

17. "Possession, custody, or control" refers to and includes documents actually within the possession, custody or control of NS or any other person acting for or in concert with NS; and refers to and includes documents prepared by, obtained, or placed in the possession, custody, or control of any such person within the scope of his or her duties or relationship to NS; and further refers to and includes documents having been

placed in the temporary possession, custody, or control of any third party by any of the foregoing or NS. Documents are deemed to be in the possession, custody, or control of NS if NS has the right to secure the document, or a copy thereof, from another person or entity, whether public or private, having such actual physical possession, custody, or control thereof.

18. "Price" or "prices" mean the price per ton or other unit of measure, and whether it is f.o.b. or f.a.s. a railroad car, vessel, destination, port or other conveyance.

19. "Related," "related to," and "relating to" mean and include making a statement discussing, describing, referring to, reflecting, explaining, analyzing, or in any way pertaining to, in whole or in part, the subject matter of the Interrogatory or Request.

20. "Road Train" means "Through train" as used in NS's R-1 Annual Report to the STB.

21. "SARR States" means the states of Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia.

22. "SMEPA route(s)" means the railroad line segments over which NS moves or reasonably could move loaded and empty coal trains between Origins and Destination, including, but not limited to: (i) the route through Bluefield and St. Paul, VA, Knoxville, TN, Birmingham, AL, and Meridian, MS; and (ii) the route through Roanoke, Altavista, and Danville, VA, Greensboro and Charlotte, NC, Spartanburg, SC, Atlanta, GA, Birmingham, AL, and Meridian, MS.

23. "SMEPA train(s)" or "SMEPA service" means the trains containing loaded or empty coal cars moving between Origins and Destination over the SMEPA route(s).

24. "TCS" means Triple Crown Services and/or its subsidiaries and affiliates.

25. "T-Cubed" means Thoroughbred Technology and Telecommunications and/or its subsidiaries and affiliates.

26. "TDIS" means Thoroughbred Direct Intermodal Services and/or its subsidiaries and affiliates.

27. "And," "or," and/or "each" shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each Interrogatory or Request all responsive information or documents which otherwise might be construed as outside the scope of the Interrogatory or Request. All use of the masculine gender shall be deemed to include the feminine.

II. INSTRUCTIONS

NS is requested to conform to the following instructions in responding to these Requests and Interrogatories.

1. Each paragraph shall operate and be construed independently. Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

2. Where these discovery requests seek data in a computer-readable format, machine-readable format, or in its native format, this data is defined as an

Interrogatory No. 10

Please identify the location and name of each intermodal terminal or yard located in the SARR States, and provide the following information for each identified facility:

- a. Please describe the services NS (or any third-party) provides at each facility;
- b. For each facility, please identify whether any loading or unloading facilities are owned and/or operated by NS or by an outside contractor. In the event an outside contractor owns and/or operates any identified facility, please describe any applicable lift or other charges incurred by NS for such services;
- c. Please describe the security procedures and measures employed at each facility identified in response hereto; and
- d. For each intermodal terminal (ramp/deramp facility), please identify the number of containers and/or trailers (separately for loaded and empty containers and/or trailers) moving to and from each facility in each of the years 2009 and 2010.

Interrogatory No. 11

Please identify each scheduled Road Train operating in the SARR States and for each of the identified Road Trains, please identify the following:

- a. NS's train identifier or designation of each identified Road Train and the beginning and end points served by each of the identified Road Trains;
- b. State whether the crews are assigned or in pool service. Identify home and away-from-home terminals for each crew district;
- c. The scheduled on-duty and off-duty locations for each crew assigned to the identified Road Trains;
- d. The number of crew members typically assigned per shift to each of the identified Road Trains;

Request for Production No. 6

Please produce the data bases, data warehouses and computer programs (with all documentation related to these data bases and computer programs and associated selection criteria), in a computer-readable format, that include the information listed below for each movement handled by NS as originating, terminating, overhead or single-line carrier that traveled in the SARR States for each year or partial year 2010 to the present:

- a. Consignee, shipper, payee, and/or customer;
- b. Commodity (seven-digit Standard Transportation Commodity Code "STCC");
- c. Origin city and state;
- d. Destination city and state;
- e. For shipments that originated on NS's system(s), the date and time the shipment was originated;
- f. For shipments NS received in interchange, the on junction location station number and Standard Point Location Code ("SPLC");
- g. For shipments NS received in interchange, the road received from;
- h. For shipments NS received in interchange, the date and time the shipment was interchanged;
- i. For shipments given in interchange, off junction location and station number;
- j. For shipments given in interchange, the road given to;
- k. For shipments given in interchange, the date and time the shipment was interchanged;

- l. For shipments terminated on NS's system, the date and time the shipment was terminated;
- m. Origin Freight Station Accounting Code ("FSAC");
- n. Destination FSAC;
- o. Origin SPLC;
- p. Destination SPLC;
- q. NS Interchange Location(s) FSAC(s);
- r. NS Interchange Location(s) SPLC(s);
- s. Number of rail cars;
- t. Tons (Net);
- u. Rail car tare weight;
- v. Total freight revenues from origin to destination, or NS's share of the total freight revenues in the event NS is not the sole carrier for a particular movement, including any adjustments thereto, along with a description of the adjustment (*i.e.*, add to or subtract from gross revenue);
- w. Total revenues from surcharges (including but not limited to fuel surcharges), and whether such revenue from surcharges is included in the total freight revenues and NS's division thereof provided in response to Subpart (v) above;
- x. The contract, agreement, tariff, or other pricing authority that the shipment is billed under;
- y. Waybill number and date;
- z. TOFC/COFC plan;
- aa. Car/trailer/container initial for each car/trailer/container used to move the shipment;

- bb. Car/trailer/container number for each car/trailer/container used to move the shipment;
- cc. If a trailer or container is used to move the shipment, the car initial and number used to move the trailer or container;
- dd. The train identification number of all trains used to move the shipment;
- ee. The number of locomotives, by train identification, by segment, used to move the shipment;
- ff. The total horsepower, by train identification, by line segment, used to move the shipment;
- gg. Total loaded movement miles;
- hh. Total loaded miles on NS's system;
- ii. AAR car-type code;
- jj. Provider of car (NS-owned, NS-leased, shipper or foreign road);
- kk. Number of intermodal containers/trailers;
- ll. Intermodal container/trailer tare weight;
- mm. Total empty movement miles;
- nn. Miles used to derive applicable fuel surcharges;
- oo. Applicable fuel surcharge rate;
- pp. Total empty miles on NS's system;
- qq. AAR car-type code;
- rr. Intermodal service plan code and the intermodal line of business code for each intermodal shipment;
- ss. Length, width and height for each car/container/trailer used to move the shipment; and

- tt. Number of articulated wells included (where applicable) in an individual railcar used to move an intermodal (or other) shipment.

Request for Production No. 7

Please produce documents, in a computer-readable format to the extent available, which contain complete information (including all events) tracking and describing car, trailer/container, and locomotive movements (including yard and hub operations) from origin to destination for each car, trailer/container, and locomotive moving in the SARR States for each year or partial year 2008 to the present. Provide location information by station, state, SPLC, and milepost to the extent available.

Request for Production No. 8

Please provide documents that record complete train movement data (including all events and intermediate stations) in a computer readable format to the extent available, from origin to destination for all NS train movements (including yard and hub operations) to, from, within or through the SARR States for each year or partial year 2008 to the present. Provide location information by station, state, SPLC, and milepost to the extent available.

Request for Production No. 9

Please provide all documents, including programs, decoders, and instructions, necessary to utilize, evaluate and link the data produced in response to Request for Production No. 6, Request for Production No. 7, and Request for Production No. 8. Please include with this production a description of the relationship between the databases (*e.g.*, whether there is a 1:1 ratio between databases, or whether one can expect

to link 100% of the records in one file to another file). Please also indicate which data fields are common (and are used to link) to the provided databases.

Request for Production No. 10

Please produce documents sufficient to show the relationship(s) between, and scope of, all databases used to record, monitor, track and invoice trains and/or cars on NS's system, including, but not limited to, graphical representations of such systems.

Request for Production No. 11

For each database identified in response to Request for Production No. 10, please produce documents sufficient to show the fields in each database and the type of data in each field (*i.e.*, a detailed field description and decoder for each unique entry in each field).

Request for Production No. 12

For each database identified in response to Request for Production No. 10, please produce documents sufficient to show the standard reports (including a description of the report) that are produced from data contained in the databases, including reports that rely on multiple databases. "Standard reports" include regularly scheduled recurring reports and commonly requested ad-hoc reports.

Request for Production No. 13

Please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices or attachments), and all tariffs, common carrier pricing authorities or other documents containing common carrier rate and service terms (collectively "pricing authorities"), entered into, agreed to or

Request for Production No. 71

Please produce documents showing the ad valorem taxes that NS paid to each of the SARR States for each year or partial year 2008 to the present, together with documents showing the total route-miles and total track-miles NS owned or owns in the state for each year 2008 to the present.

Request for Production No. 72

Please produce documents sufficient to show the following information for each intermodal facility located in the SARR States:

- a. The annual costs to operate each facility separated by function; and
- b. The annual throughput of each facility (*e.g.*, automobiles, containers, trailers, carloads, etc.).

Request for Production No. 73

Please produce all documents relating to any contribution by any governmental or quasi-governmental entity (including, without limitation, AMTRAK) to construction, upgrading, maintenance and/or operating expenses on any NS lines in the SARR States.

Request for Production No. 74

Please produce an unredacted copy of NS's Positive Train Control ("PTC") Implementation Plan filed with the Federal Railroad Administration as required under 49 C.F.R. Part 236, as well as any amendments or supplements thereto.

Request for Production No. 75

Please produce documents sufficient to show NS's actual or expected costs (including costs for design, installation and maintenance) to implement its PTC program, as described in NS's PTC Implementation Plan, in any of the SARR States. If no such documents exist, please produce documents sufficient to show NS's actual or expected cost per route mile and/or track mile to implement its PTC Implementation Plan on a system-wide basis.

Request for Production No. 76

Please produce copies of the most current land valuation maps for the SARR States, and all documents (including but not limited to deeds or other instruments of grant or conveyance) related to the parcels identified on those maps.

Request for Production No. 77

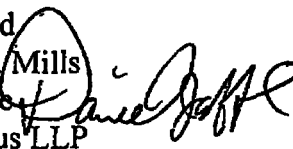
Please produce documents sufficient to show all donated rights of way and/or land grants (including easements) obtained by NS and/or NS's predecessors in connection with the construction of any rail lines or facilities located in the SARR States.

Request for Production No. 78

Please produce all documents related to any sale, appraisal, abandonment or acquisition of land (improved and unimproved) that NS completed in the SARR States since 2008, including but not limited to documents showing the location of the parcel, size of the parcel, the valuation of the parcel by NS, the sale or acquisition price, a description of any improvements to the parcel, the date of sale, and any characteristics of the parcel such as land use, utilities, access and topography.

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Dated: January 14, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SOUTH MISSISSIPPI ELECTRIC POWER
ASSOCIATION

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42128

**DEFENDANT'S RESPONSES AND OBJECTIONS TO COMPLAINANT'S FIRST
REQUESTS FOR ADMISSION, INTERROGATORIES, AND REQUESTS FOR
PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, Norfolk Southern Railway Company ("NS"), through undersigned counsel, responds as follows to Complainant South Mississippi Electric Power Association's ("SMEPA's") First Requests for Admission, Interrogatories, and Requests for Production of Documents (the "Discovery Requests").

GENERAL OBJECTIONS

NS's General Objections, as set forth herein, are to be considered objections to each of the specific interrogatories and document requests (including subparts) that follow. NS's objections shall not waive or prejudice any objections that it may later assert.

1. NS objects to any and all definitions and/or instructions to the extent that the definitions and instructions either seek to expand upon or conflict with 49 C.F.R. Part 1114, Subpart B. Further, NS objects to these Discovery Requests to the extent that they seek to impose obligations on NS that are greater than, or are inconsistent with, those imposed under 49 C.F.R. Part 1114, Subpart B.

2. NS objects to each and every Discovery Request to the extent that it seeks information protected by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege, exemption, or protection from discovery or disclosure. In the event that any such information is inadvertently produced or provided, and such information is the proper subject of the attorney-client privilege, the attorney work-product doctrine and/or other applicable privilege, exemption, or protection, such disclosure is not to be construed as a waiver of any of these privileges, exemptions, or protections. NS reserves the right to demand that such inadvertently produced privileged information be returned to it and that all copies in SMEPA's possession, and that of its counsel, consultants, subsidiaries or other agents, be destroyed.

3. NS objects to each and every Discovery Request to the extent that it seeks production of information or data that is not relevant to the subject matter at issue in this proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence.

4. NS objects to each and every Discovery Request requesting that NS produce "all" responsive information. For those requests to which it is obliged to respond, NS will produce or make available for inspection such responsive non-privileged information or documentation as it is able to locate or identify in a reasonable search.

5. NS objects to each and every Discovery Request to the extent that it would require NS to perform a "special study" to derive the requested information.

6. NS objects to each and every Discovery Request to the extent that it is: a) overly broad; b) impermissibly vague or ambiguous, and fails to describe with reasonable particularity the information sought; or c) imposes undue burdens that outweigh any probative value the information sought may have in this proceeding.

7. NS objects to each and every Discovery Request to the extent that it purports to request information that is already in the possession of SMEPA. Further, NS objects to each and every Discovery Request to the extent that it seeks disclosure of information that is readily available or accessible to SMEPA.

8. NS objects to each and every Discovery Request to the extent that it purports to request information and data that is Sensitive Security Information ("SSI"), classified or otherwise prohibited from disclosure, or documents whose public release could jeopardize the safety of the public and/or NS employees. NS will not produce or make available for inspection any documents that may contain SSI absent a solution to ensure compliance with applicable regulations governing SSI. Subject to and without waiving this objection, unless otherwise indicated NS will search for and produce or make available for inspection non-privileged information or documents which are not SSI, not classified, not prohibited from disclosure, and whose public release would not jeopardize the safety of the public or of NS employees.

9. NS objects to SMEPA's demand that copies of any responsive documents be delivered to the offices of SMEPA's counsel, which is inconsistent with the Board's rule that a party producing documents may do so by making them available for inspection. *See* 49 C.F.R. § 1114.30(a)(1). Several of SMEPA's requests call for documents or data so voluminous that NS will make such documents or data available for inspection by SMEPA's counsel or consultants rather than delivering copies to SMEPA's counsel. In its Specific Objections and Responses NS has indicated the requests for which it will make documents available for inspection. NS reserves its right to designate additional requests for which it will make documents available for inspection rather than delivering copies.

10. NS objects to Definition 13 of the Discovery Requests to the extent that it defines NS to include all subsidiaries of NS, on the grounds that such definition is overbroad and unduly burdensome. NS specifically objects to producing data and information for non-wholly owned subsidiaries and for switching and terminal railroad subsidiaries, on the ground that producing responsive information for these entities, to the extent such information exists, would be unduly burdensome and would have little to no relevance to the issues in this proceeding.

11. NS objects to SMEPA's Definition 6 defining "Document" to the extent it seeks to impose obligations broader than, or inconsistent with, those imposed by 49 C.F.R. Part 1114. NS objects to SMEPA's demand that NS produce documents in its "prior possession, custody and control." It is both unreasonable and illogical to demand that NS produce documents that are not in its current possession, custody, or control. NS further objects to the definition of "Document" to the extent it seeks information or data that is privileged, protected by the work product doctrine, or otherwise protected, exempted, or excluded from discovery or disclosure by an applicable privilege, protection, rule, or doctrine. In these Responses, NS will interpret the term "Document" to exclude any data or information that is protected from discovery or disclosure by such privilege, protection, doctrine, or rule.

12. NS objects to SMEPA's Definition 9 defining "'Identify' when referring to a document" to the extent it seeks to impose obligations or requirements beyond, in addition to, or inconsistent with discovery obligations under 49 C.F.R. Part 1114. NS has no duty to search for, gather, and catalog every document possibly implicated by an interrogatory with the multiple pieces of information specified as required by the definition. This definition would impose an undue burden that outweighs any relevance or probative value the information sought may have in this proceeding. NS will respond to any interrogatory asking it to "identify" particular

documents as if it were a request for production of those documents and respond in accordance with 49 C.F.R. § 1114.30.

13. NS objects to SMEPA's Definition 17 defining "possession, custody, or control" to the extent it seeks to impose obligations or requirements beyond, in addition to, or inconsistent with NS's discovery obligations under 49 C.F.R. Part 1114.

14. NS objects to SMEPA's Definition 19 defining "related," "related to," and "relating to" on the grounds that such definition is overbroad and unduly burdensome.

15. NS generally objects to SMEPA's Instruction 2 as overbroad, unduly burdensome, and oppressive to the extent that SMEPA demands that NS produce data in accordance with the precise and extensive format and detailed parameters and attributes demanded by SMEPA – regardless of whether data are actually kept in such format – and that NS accompany such data with detailed explanations and descriptions of that data – regardless of whether NS actually has records with such explanations and descriptions, and regardless of the extent to which SMEPA (including its consultants) could determine or understand some or all of the data without further explanations and descriptions. NS further objects to Instruction 2 as seeking special studies, which NS declines to conduct. In addition, NS objects to Instruction 2 as ambiguous, unclear, prolix, and susceptible of multiple inconsistent interpretations and constructions. In response to Instruction 2 and SMEPA's requests for data in "computer readable format," NS states that, where SMEPA requests information in computer readable format, NS will produce or make available for inspection data in a format that it understands to be computer readable (as NS interprets that term), to the extent responsive data or information exists and is reasonably available in such a format. NS will provide descriptions of such data to

the extent they exist and are reasonably available. Below NS states further objections to specific subparts of Instruction 2.

16. NS objects to Instruction 2(a)(i) to provide the “name and description of the source database or other file” from which computer readable information is provided to SMEPA. NS has no duty to undertake to catalog and document its internal systems as such a request would constitute a “special study.” *See, e.g., Entergy Ark., Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104 (May 19, 2008). Moreover, such information would be unduly burdensome to create and is not relevant to any issue in this proceeding, nor is such information necessary to enable SMEPA to use any information to be provided.

17. NS objects to Instruction 2(a)(ii) to provide “[a] description of how the records in the file produced were selected” as seeking information protected by the attorney-client privilege and/or work-product doctrine. Furthermore, such information would be unduly burdensome to create and is not relevant to any issue in this proceeding or necessary to enable SMEPA to use information to be provided by NS.

18. NS objects to Instruction 2(a)(iii) as seeking to impose obligations or requirements beyond, in addition to, or inconsistent with discovery obligations under 49 C.F.R. Part 1114. NS has no obligation to undertake to catalog and document its internal systems as such a request would constitute a “special study.” *See, e.g., Entergy Ark., Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104 (May 19, 2008). Such information would be unduly burdensome to create and is not relevant to any issue in this proceeding, nor is such information necessary to enable SMEPA to use any information to be provided. Moreover, NS has no obligation to provide SMEPA with any “intermediate file[s]” created by NS in its effort to provide SMEPA with responsive information. Production of such files would be duplicative of the information in

“final files.” Moreover, any “intermediate files[s]” used to create files produced in this litigation are protected by the work-product doctrine.

19. NS objects to Instruction 2(a)(iv) as seeking to impose obligations or requirements beyond, in addition to, or inconsistent with discovery obligations under 49 C.F.R. Part 1114. NS further objects to the instruction to produce “[a] relational diagram defining relationships between tables, with all fields” on the grounds that NS has no duty to undertake to catalog and document its internal systems as such a request would constitute a “special study.” *See, e.g., Entergy Ark., Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104 (May 19, 2008). Such information would be unduly burdensome to create and is not relevant to any issue in this proceeding, nor is such information necessary to enable SMEPA to use any information to be provided.

20. NS objects to Instruction 2(b) as vague, ambiguous, confused, and seeking to impose obligations or requirements beyond, in addition to, or inconsistent with NS’s discovery obligations under 49 C.F.R. Part 1114. NS has no duty to undertake to catalog and document all “computer-readable” information provided to SMEPA in the unduly complex format specified by SMEPA. Responsive information provided in computer-readable format will be described to the extent necessary for SMEPA to use such information.

21. NS objects to SMEPA’s Instructions 3, 6, and 7 to the extent they attempt to impose obligations or requirements beyond, in addition to, or inconsistent with NS’s discovery obligations under 49 C.F.R. Part 1114. NS’s duties in responding to SMEPA’s discovery requests are governed by the Board’s rules, and SMEPA cannot change or expand those duties by propounding “Instructions.”

22. NS objects to SMEPA's Instruction 9 as overbroad and unduly burdensome to the extent it requests documents and information "to the present." The "present" is continually changing, and to the extent Instruction 9 would have NS continuously update its discovery responses "to the present" over the course of this case, such a request is unreasonable and unduly burdensome. Unless otherwise indicated, NS's responses will cover the period from January 1, 2008 through December 31, 2010.

23. NS does not concede the relevance, materiality, competency, or admissibility as evidence of documents or information requested in the Discovery Requests. Production of documents or information in response to the Discovery Requests does not waive any of NS's objections to use of such information in this proceeding. NS reserves its right to object on any ground to the use of the responses herein in this proceeding or in any subsequent appeal, proceeding, action or trial.

SPECIFIC OBJECTIONS AND RESPONSES

In addition to its General Objections (which apply in full to each and every Discovery Request, without further enumeration), below NS sets forth Specific Objections and Responses to each Request for Admission, Interrogatory, and Request for Production. NS preserves all of its General Objections set forth above, and none of the following Specific Objections shall waive its General Objections. Nor shall any of NS's specific objections limit the scope, breadth, generality, or applicability of those General Objections.

I. REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1

Admit that each of the Challenged Rates exceeds 180 percent of the variable cost of providing the transportation to which each of the Challenged Rates apply.

segments with a GWR less than 286,000 lbs per rail car. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection business records or other documents from which the answer to this Interrogatory can be derived or ascertained. *See* 49 C.F.R. § 1114.26(b).

INTERROGATORY NO. 10

Please identify the location and name of each intermodal terminal or yard located in the SARR States, and provide the following information for each identified facility:

- a. Please describe the services NS (or any third-party) provides at each facility;
- b. For each facility, please identify whether any loading or unloading facilities are owned and/or operated by NS or by an outside contractor. In the event an outside contractor owns and/or operates any identified facility, please describe any applicable lift or other charges incurred by NS for such services;
- c. Please describe the security procedures and measures employed at each facility identified in response hereto; and
- d. For each intermodal terminal (ramp/deramp facility), please identify the number of containers and/or trailers (separately for loaded and empty containers and/or trailers) moving to and from each facility in each of the years 2009 and 2010.

Response:

NS objects to this Interrogatory to the extent it requires a special study that NS is not required to conduct. NS further objects to subpart (c) to the extent it calls for disclosure of Sensitive Security Information ("SSI"). Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection non-SSI business records or other documents from which the answer to this Interrogatory can be derived or ascertained. *See* 49 C.F.R. § 1114.26(b).

INTERROGATORY NO. 11

Please identify each scheduled Road Train operating in the SARR States and for each of the identified Road Trains, please identify the following:

- a. NS's train identifier or designation of each identified Road Train and the beginning and end points served by each of the identified Road Trains;
- b. State whether the crews are assigned or in pool service. Identify home and away-from-home terminals for each crew district;

for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 5

Please produce documents sufficient to show NS's train identifier, designation and/or symbol, and the beginning and end points served, for each Road Train that operated over any portion of NS's lines in the SARR States in 2010.

Response:

NS objects to this Request to the extent it requires a special study that NS is not required to conduct. Subject to and without waiving this specific objection or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 6

Please produce the data bases, data warehouses and computer programs (with all documentation related to these data bases and computer programs and associated selection criteria), in a computer-readable format, that include the information listed below for each movement handled by NS as originating, terminating, overhead or singleline carrier that traveled in the SARR States for each year or partial year 2010 to the present:

- a. Consignee, shipper, payee, and/or customer;
- b. Commodity (seven-digit Standard Transportation Commodity Code "STCC");
- c. Origin city and state;
- d. Destination city and state;
- e. For shipments that originated on NS's system(s), the date and time the shipment was originated;
- f. For shipments NS received in interchange, the on junction location station number and Standard Point Location Code ("SPLC");
- g. For shipments NS received in interchange, the road received from;
- h. For shipments NS received in interchange, the date and time the shipment was interchanged;
- i. For shipments given in interchange, off junction location and station number;
- j. For shipments given in interchange, the road given to;
- k. For shipments given in interchange, the date and time the shipment was interchanged;
- l. For shipments terminated on NS's system, the date and time the shipment was terminated;
- m. Origin Freight Station Accounting Code ("FSAC");
- n. Destination FSAC;

- o. Origin SPLC;
- p. Destination SPLC;
- q. NS Interchange Location(s) FSAC(s);
- r. NS Interchange Location(s) SPLC(s);
- s. Number of rail cars;
- t. Tons (Net);
- u. Rail car tare weight;
- v. Total freight revenues from origin to destination, or NS's share of the total freight revenues in the event NS is not the sole carrier for a particular movement, including any adjustments thereto, along with a description of the adjustment (*i.e.*, add to or subtract from gross revenue);
- w. Total revenues from surcharges (including but not limited to fuel surcharges), and whether such revenue from surcharges is included in the total freight revenues and NS's division thereof provided in response to Subpart (v) above;
- x. The contract, agreement, tariff, or other pricing authority that the shipment is billed under;
- y. Waybill number and date;
- z. TOFC/COFC plan;
- aa. Car/trailer/container initial for each car/trailer/container used to move the shipment;
- bb. Car/trailer/container number for each car/trailer/container used to move the shipment;
- cc. If a trailer or container is used to move the shipment, the car initial and number used to move the trailer or container;
- dd. The train identification number of all trains used to move the shipment;
- ee. The number of locomotives, by train identification, by segment, used to move the shipment;
- ff. The total horsepower, by train identification, by line segment, used to move the shipment;
- gg. Total loaded movement miles;
- hh. Total loaded miles on NS's system;
- ii. AAR car-type code;
- jj. Provider of car (NS-owned, NS-leased, shipper or foreign road);
- kk. Number of intermodal containers/trailers;
- ll. Intermodal container/trailer tare weight;
- mm. Total empty movement miles;
- nn. Miles used to derive applicable fuel surcharges;
- oo. Applicable fuel surcharge rate;
- pp. Total empty miles on NS's system;
- qq. AAR car-type code;
- rr. Intermodal service plan code and the intermodal line of business code for each intermodal shipment;
- ss. Length, width and height for each car/container/trailer used to move the shipment; and
- tt. Number of articulated wells included (where applicable) in an individual railcar used to move an intermodal (or other) shipment.

Response:

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS also specifically objects to the requests in subparts v and w, mm, and pp as irrelevant and unduly burdensome to the extent they seek non-NS information. NS further objects to this Request to the extent it seeks information about the “nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to [NS] for transportation,” 49 U.S.C. § 11904, on the grounds that disclosure of such information to a third person (*i.e.* a person other than the shipper or consignee to whom that information pertains) is generally unlawful. The Protective Order recently issued by the Board expressly provides for the production of such information (designated “Highly Confidential”), however, finding that production of that information is essential to the disposition of this case and providing that production of such information in this case “will not be deemed a violation of 49 U.S.C. § 11904.” *See* Decision at 5, ¶ 7, *South Mississippi Electric Power Association. v. Norfolk Southern Ry. Co.*, STB Docket No. 42128 (served Jan. 21, 2011) (Protective Order). Accordingly, subject to NS’s other objections, NS will search for and produce responsive information whose production would otherwise be prohibited by Section 11904, to the extent it is in NS’s possession. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 7

Please produce documents, in a computer-readable format to the extent available, which contain complete information (including all events) tracking and describing car,

trailer/container, and locomotive movements (including yard and hub operations) from origin to destination for each car, trailer/container, and locomotive moving in the SARR States for each year or partial year 2008 to the present. Provide location information by station, state, SPLC, and milepost to the extent available.

Response:

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS further objects to this Request because it is overbroad and unduly burdensome, calling for the production of millions of records. NS also objects to the undefined term "hub operations," which is vague and ambiguous. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 8

Please provide documents that record complete train movement data (including all events and intermediate stations) in a computer readable format to the extent available, from origin to destination for all NS train movements (including yard and hub operations) to, from, within or through the SARR States for each year or partial year 2008 to the present. Provide location information by station, state, SPLC, and milepost to the extent available.

Response:

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS further objects to this Request because it is overbroad and unduly burdensome, to the extent it calls for NS to produce data that is not readily accessible in a computer readable format. NS also objects to the undefined term "hub operations," which is vague and ambiguous. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for

inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 9

Please provide all documents, including programs, decoders, and instructions, necessary to utilize, evaluate and link the data produced in response to Request for Production No. 6, Request for Production No. 7, and Request for Production No. 8. Please include with this production a description of the relationship between the databases (*e.g.*, whether there is a 1:1 ratio between databases, or whether one can expect to link 100% of the records in one file to another file). Please also indicate which data fields are common (and are used to link) to the provided databases.

Response:

NS objects to this Request to the extent that it requires NS to share “programs, decoders, and instructions,” which may violate the terms of applicable software licenses and agreements. NS further objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing “decoders” or devising means to “link” data. NS also objects to this Request because it is overbroad and unduly burdensome. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 10

Please produce documents sufficient to show the relationship(s) between, and scope of, all databases used to record, monitor, track and invoice trains and/or cars on NS’s system, including, but not limited to, graphical representations of such systems.

Response:

NS objects to this Request because it is overbroad and unduly burdensome. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection sufficient documents to enable SMEPA’s counsel and

REQUEST FOR PRODUCTION NO. 26

For each NS yard in the SARR States, please produce documents, from January 1, 2010 to the present, sufficient to show switch crew assignments, hump crew assignments, Local Train assignments, the number of cars handled over each hump yard per day and the number of hazardous materials cars handled at each hump yard per day which by-pass the hump operation at each yard.

Response:

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS also objects to this Request for Production to the extent it calls for disclosure of Security Sensitive Information ("SSI"). Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive non-SSI documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 27

Please produce documents which contain the following information for NS for each year or partial year 2008 to present:

- a. The location(s) where car inspectors inspect trains in the SARR States;
- b. A description of the procedures followed by the car inspectors in preparing for and inspecting the trains;
- c. The total number of car inspections per tour of duty (by day of the week) and the total number of trains inspected per tour of duty (by day of the week), separated between coal trains and other than coal trains, for each location identified in response to (a) above;
- d. The number of car inspectors inspecting each train at each location identified in response to (a) above and the time spent by each inspector during each inspection;
- e. The daily or hourly rates of pay, including all additives, for the inspectors identified in response to (d) above;
- f. The number of trains each car inspector identified in response to (a) above inspects during his tour of duty;
- g. The other duties performed by the car inspectors identified in response to (d) above while on duty and not inspecting trains;
- h. The percentage of time the car inspectors identified in response to (d) above spend inspecting trains versus other assignments during their tour of duty;
- i. The materials and supplies used by the car inspectors at each of the locations identified in response to (a) above;

REQUEST FOR PRODUCTION NO. 73

Please produce all documents relating to any contribution by any governmental or quasi-governmental entity (including, without limitation, AMTRAK) to construction, upgrading, maintenance and/or operating expenses on any NS lines in the SARR States.

Response:

NS specifically objects to this Request as overbroad and unduly burdensome in that it seeks “all” documents relating to “any” contribution made. Subject to and without waiving this specific objection or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 74

Please produce an unredacted copy of NS’s Positive Train Control (“PTC”) Implementation Plan filed with the Federal Railroad Administration as required under 49 C.F.R. Part 236, as well as any amendments or supplements thereto.

Response:

NS specifically objects to this Request to the extent it calls for disclosure of Sensitive Security Information (“SSI”). Subject to and without waiving this specific objection or the General Objections, NS responds that it will produce or make available for inspection responsive non-SSI documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 75

Please produce documents sufficient to show NS’s actual or expected costs (including costs for design, installation and maintenance) to implement its PTC program, as described in NS’s PTC Implementation Plan, in any of the SARR States. If no such documents exist, please produce documents sufficient to show NS’s actual or expected cost per route mile and/or track mile to implement its PTC Implementation Plan on a system-wide basis.

Response:

NS specifically objects to this Request to the extent it calls for disclosure of Sensitive Security Information (“SSI”). Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive non-SSI documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 76

Please produce copies of the most current land valuation maps for the SARR States, and all documents (including but not limited to deeds or other instruments of grant or conveyance) related to the parcels identified on those maps.

Response:

NS objects to this Request as overbroad and unduly burdensome, as it calls for production of thousands of voluminous land valuation maps as well as “all” documents “related to” identified parcels. Subject to and without waiving this specific objection or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

REQUEST FOR PRODUCTION NO. 77

Please produce documents sufficient to show all donated rights of way and/or land grants (including easements) obtained by NS and/or NS’s predecessors in connection with the construction of any rail lines or facilities located in the SARR States.

Response:

NS objects to this Request as overbroad and unduly burdensome, as it calls for production of documents identifying “all” donated rights of way and easements. Subject to and without waiving this specific objection or the General Objections, NS responds that it will

wishes to guess at the STB's determination for 2010 cost of capital by analyzing the AAR's submission in such a proceeding, then SMEPA can review AAR's final submission when it has been filed. SMEPA plainly does not have the right to review privileged documents and correspondence related to that submission.

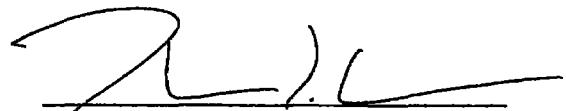
REQUEST FOR PRODUCTION NO. 122

Please produce all documents, analysis or studies which compares or considers the non-rate conditions of carriage in expired contract C-9376 with the common carrier conditions of carriage in NSRQ 65837, including, but not limited to, conditions of carriage specifically included in NSRQ 65837 and NS Conditions of Carriage #2-J, which is incorporated by reference into NSRQ 65837.

Response:

NS objects to this Request to the extent that it calls for information protected by the attorney-client privilege and/or work product doctrine. NS further objects to this Request as premature in light of the NS's pending Motion to Dismiss SMEPA's unreasonable practices claim. *See* Motion to Dismiss, STB Docket No. 42128 (filed Jan. 18., 2011).

Respectfully submitted,



James A. Hixon
John M. Scheib
David L. Coleman
Christine I. Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

G. Paul Moates
Terence M. Hynes
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Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to Norfolk Southern Railway Company

Dated: February 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2011, I caused a copy of the foregoing Responses and Objections to Complainant's First Requests for Admission, Interrogatories, and Requests for Production of Documents to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

William L. Slover
Kelvin J. Dowd
Christopher A. Mills
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, DC 20036

Jeff C. Bowman
Jackson, Bowman, Blumentritt & Arrington, PLLC
309 S. 40th Avenue
Hattiesburg, MS 39402


Matthew J. Warren

Kelvin Dowd

From: Hemmersbaugh, Paul A. [phemmersbaugh@sidley.com]
Sent: Monday, March 07, 2011 9:41 AM
To: Kelvin Dowd; Christopher A. Mills
Cc: Moates, G. Paul; Moreno, Jeffrey
Subject: SMEPA v. Norfolk Southern, STB No. 42128

Kelvin,

Sidley Austin represents defendant Norfolk Southern Railway Company ("NS") in the STB rate case brought by your client South Mississippi Electric Power Association ("SMEPA"). As I advised you last Friday, certain information sought by Complainant SMEPA in discovery in the pending rate case – including traffic data – constitutes Sensitive Security Information ("SSI") subject to security protections and restrictions under federal law. As we discussed, Norfolk Southern has determined that, under applicable agency rules, regulations, and guidance, it may not release such SSI to third parties, including counsel and consultants for a rate case complainant. You requested that I memorialize in an email the information I conveyed to you last Friday.

Because some of the SSI that SMEPA seeks may be important to evidence the parties may wish to use and submit in the pending rate case, NS believes it is necessary and appropriate to obtain instruction and direction from the cognizant federal government agencies regarding potential production and use of that information in an STB rate case. As I further advised you on Friday, NS is willing to produce relevant and otherwise discoverable data and information containing SSI to SMEPA, but only if it first receives authorization, direction, and advice from the relevant federal agencies (including but not necessarily limited to, FRA, TSA, and STB) concerning the production of that information in an STB rate case, and NS's obligations and responsibilities with respect to the type of information it may produce and the manner and conditions under which such information may be produced.

In order to address this important concern as expeditiously as possible, NS has contacted the STB's Office of Proceedings and requested that the STB convene a discovery conference to discuss this matter at its earliest convenience. Because the same information and issues are raised by discovery requests served by complainant DuPont in another pending rate case against NS (STB Dkt. No. 42125), we propose that counsel for NS, SMEPA, and DuPont participate in the requested conference (counsel to DuPont, Jeff Moreno, is copied on this email). We will advise you when the Board has scheduled a discovery conference to discuss this matter. If you have questions in the interim, please contact Paul Moates or me.

Regards,

Paul Hemmersbaugh

Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C.
(202) 736-8538

IRS Circular 230 Disclosure: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this communication, including attachments, was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding any penalties that may be imposed on such taxpayer by the Internal Revenue Service. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addressed in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

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March 7, 2011

Paul A. Hemmersbaugh, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Re: STB Docket No. 42128, *South Mississippi Electric
Power Association v. Norfolk Southern Railway Company*

Dear Paul:

On behalf of Complainant, South Mississippi Electric Power Association ("SMEPA"), this responds to your e-mail of this date concerning the production by Norfolk Southern Railway ("NS") of certain data and documents that are responsive to discovery requests propounded by SMEPA in the referenced action. Therein, you stated that it is NS' position that traffic data and other unspecified information constitutes "Sensitive Security Information" under federal law, and will not be produced by NS absent "authorization, direction and advice" from a variety of federal agencies that have no jurisdiction over the subject matter of the referenced docket.

SMEPA does not agree with NS regarding the scope of what legitimately constitutes SSI, or the alleged restrictions on NS' production of otherwise relevant and essential traffic data and other information in the instant proceeding, particularly under the auspices of the governing Protection Order. Your correspondence offers no citation to any statute, regulation or court or agency rulings that support NS' position, which is both unprecedented and in conflict with the consistent positions of other Class I U.S. railroads in litigation before the STB, that SSI restrictions at most affect only certain elements of a railroad's Positive Train Control plans. SMEPA also objects to the suggestion that federal agencies other than the STB can or should have any role in determining "NS' obligations and responsibilities with respect to the type of information it may produce and the manner and conditions under which such information may be produced." *Inter alia*, this suggestion ostensibly could lead to NS' refusal to produce otherwise essential and indisputably relevant evidence under the STB's *Coal Rate*

Paul A. Hemmersbaugh, Esq.

March 7, 2011

Page 2

Guidelines based on the extra-jurisdictional views of an agency with no real knowledge expertise with respect to the regulation of railroads under the ICCTA.

We understand that a discovery conference is being scheduled for 10:30am tomorrow with STB staff, to address the issues that you raise. Confirming our earlier communication, we will attend on behalf of SMEPA and participate in the discussion. We wish it to be clearly understood, however, that such participation does not reflect any acquiescence in NS' claims regarding SSI, and is without waiver of or prejudice to any and all rights available to SMEPA under applicable law with respect to the subject matter. Finally, it would be helpful if in advance of the meeting you would provide us with copies of or citations to the binding legal authorities which NS contends support its position.

Please feel free to contact the undersigned if you have questions or wish to confer.

With best regards,

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Dowd', with a stylized flourish at the end.

Kelvin J. Dowd

Cc: Jeff Bowman, Esq.
G. Paul Moates, Esq.



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FOUNDED 1856

March 9, 2011

By Hand Delivery

Rachel D. Campbell
Director
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: *E.I. Du Pont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42125;
South Mississippi Elec. Power Association v. Norfolk Southern Ry. Co., STB Dkt No. 42128

Dear Director Campbell:

We represent Defendant Norfolk Southern Railway Company ("NS") in the above-referenced rail rate cases. NS thanks the Board for promptly convening the Board-supervised discovery conference that we requested, to address concerns about certain discovery requests propounded by complainants in the two pending rate cases. We reiterate that NS shares with complainants a desire to resolve expeditiously the conflict between the requirements of rail rate case discovery, on one hand, and transportation security requirements concerning sensitive security information ("SSI"), on the other. As we emphasized at yesterday's conference, NS does not wish to impede relevant discovery or the progress of these rate cases. At the same time, however, NS is obliged to adhere to other federal agencies' rules, regulations, requirements and direction concerning the manner and conditions under which information that may be SSI may be provided to other persons.

Pursuant to our agreement yesterday, NS submits this letter summarizing its SSI-related concerns and requests that the Board: (1) consult with the Federal Railroad Administration ("FRA"), the Transportation Security Administration ("TSA") and other agencies with jurisdiction over SSI, concerning the issues and obligations discussed in this letter; and then (2) issue a ruling (in coordination with the other cognizant agencies) concerning whether and under what conditions such information may be produced in discovery and used as evidence in these rate cases. NS believes it is in the best interests of the Board and its stakeholders to work with these other agencies to harmonize any conflicting rules or requirements, and to resolve issues related to the production and use of SSI in STB proceedings now.

Director Rachel D. Campbell
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We start with some brief background information on SSI, governing regulations, and restrictions on the disclosure of SSI. The letter then describes and discusses the three primary categories of SSI at issue in these rate cases, which we also discussed at yesterday's joint discovery conference.¹

I. Sensitive Security Information

Sensitive Security Information ("SSI") is "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which the Secretary of DOT has determined would . . . [b]e detrimental to the security of transportation." 49 C.F.R. § 15.5(a); *see* 49 C.F.R. § 1520.5²; *see also* 49 U.S.C. §§ 114, 40119. Section 15.5(a) designates several categories of information as SSI, including "[v]ulnerability assessments," "rail transportation security measures," and information on critical rail infrastructure assets. 49 C.F.R. § 15.5(b)(5, 8, 12); *see* 49 C.F.R. § 1520.5(b) (listing 16 categories of SSI, including those listed in Section 15.5(b)). SSI may be disclosed only to "covered persons" with a "need to know." *See* 49 C.F.R. §§ 15.7, 15.11, 1520.9, 1520.11. Federal courts have recognized that SSI is privileged and protected against litigation discovery. *See, e.g., Chowdhury v. Northwest Airlines Corp.*, 226 F.R.D. 608, 615 (N.D. Cal. 2004).

In addition to posing a threat to transportation security, unauthorized disclosure of SSI exposes the person or entity who releases such information to fines and penalties, as well as enforcement and corrective actions by TSA, FRA, and other cognizant agencies. *See, e.g.*, 49 C.F.R. §§ 15.17, 1520.17. To NS's knowledge, the Board does not have explicit statutory or

¹ This letter is intended as a general description of important issues and concerns regarding SSI in these cases, to aid in the expeditious resolution of those issues. NS reserves the right to submit full legal briefs and arguments on matters discussed in this letter or any related issues or questions, should it become necessary.

² The U.S. Department of Transportation regulations concerning SSI are primarily set forth in Part 15 of Title 49 of the Code of Federal Regulations. As a DOT agency, the Federal Railroad Administration applies and implements Part 15 with respect to rail carriers. A parallel set of regulations, set forth in Part 1520 of Title 49, is applied and administered by the Transportation Security Administration of the U.S. Department of Homeland Security. Those TSA security regulations, which apply to "all modes of transportation" (including rail carriers) largely parallel the DOT/FRA regulations set forth in Part 15. Because Part 1520 is administered by a different agency (and a different Department), it is possible that the cognizant agencies' interpretations and applications of Parts 15 and 1520 may differ in some instances. This is one reason that NS requests that the Board consult both FRA and TSA to determine their views and positions concerning the production of SSI in these cases.

Director Rachel D. Campbell
Page 3

regulatory authority to designate information as SSI (or to remove an SSI designation), to declare that certain individuals or entities have a “need to know” SSI, or to otherwise authorize the release of SSI. Moreover, the Protective Orders issued by the Board to govern these cases do not address discovery of SSI.

Given the potential for conflicting obligations with respect to the disclosure and use of SSI in connection with a rate case, and the significant competing interests at stake, NS hereby requests that – after consultation with FRA and TSA (the primary agencies charged with review and protection of SSI) – the Board issue a ruling concerning whether and under what conditions NS should produce relevant SSI requested by complainants for use in these rate cases. As we have advised counsel for complainants and Board staff, NS believes that both prudence and compliance with federal security regulations dictate that, before NS produces information it believes to be SSI in these rate cases, it must obtain clear, coordinated authorization and direction from the responsible federal agencies charged with review and protection of transportation SSI. The necessary rulings include, at a minimum: (i) Confirmation that the information at issue constitutes SSI; (ii) Whether and under what conditions such SSI may be released to complainants, their counsel or consultants; and (iii) Whether, to what extent, and under what conditions such SSI may be included or incorporated in evidence filed with the Board in the referenced maximum rate reasonableness cases.³

II. Three Primary Categories of Discovery Requests Seeking SSI

Although a number of the myriad, extensive discovery requests served in these cases could potentially encompass at least some SSI, three primary categories of discovery requests are the focus of NS’s present concern regarding the production of SSI. Those categories are: TIH traffic and event records; hazardous materials security and routing plans, protocols and information developed by NS at the direction of FRA and the Pipeline and Hazardous Materials

³ Given the sensitivity of SSI, NS would expect that any SSI released in this case would be designated “Highly Confidential” under the Board’s Protective Order, which effectively would limit its use and dissemination to outside counsel and consultants for the parties who are working on the rate cases (and have signed the relevant confidentiality undertaking), as well as the Board and its staff who analyze and review the evidence filed by the parties. Thus, at most, any SSI released in this case would be limited to persons authorized to review Highly Confidential information. NS further suggests that any SSI filed as evidence in the rate cases, or otherwise submitted to the STB, should be exempt from public disclosure or production under the Freedom of Information Act.

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Administration ("PHMSA"); and NS's Positive Train Control Implementation Plan. Below, we discuss each of those categories.⁴

TIH Traffic Event Records

Both Complainants have requested that NS produce very detailed traffic records relating to movements handled by NS in SARR States. *See, e.g.*, DuPont Requests for Production ("RFP") 20-22; SMEPA RFP 6-8. The responsive traffic records that NS is preparing to produce include recent train and car event records that detail how each freight car handled by NS traveled through the NS system, including information revealing the routing of each car and the date and time of each "event" relating to that car (such as origin, destination, intermediate stations, interchange locations, switches, and yard activity). The system-wide car event data will include traffic records for all commodities -- including Toxic By Inhalation and Poisonous By Inhalation commodities, explosive commodities, and radioactive material (for convenience, collectively referred to below as "TIH commodities").⁵ This routing data will be very current, including records for movements through the end of 2010. As a result, the traffic event files will show where NS routes TIH commodities and the stations, yards, rail lines, and trains that typically handle those highly dangerous commodities. As we discussed at the discovery conference yesterday, NS acknowledges that traffic data (including car event records) are essential to a SAC case, and NS is ready and willing to produce such traffic data. Before NS can do so, however, it requires an authoritative determination that production of such information will not violate obligations imposed by agencies charged with the protection of SSI.

The FRA has determined that TIH traffic routing information is SSI. For example, in SSI Order 2005-09-FRA-01, the FRA Administrator ruled that all railroad traffic information submitted to it regarding TIH commodities qualified as SSI. *See Designation of Sensitive Security Information Under 49 U.S.C. § 40119(b)*, SSI Order 2005-09-FRA-01 (Sept. 27, 2005) (hereafter, "FRA SSI Order") (copy attached as Exhibit 1). As the FRA SSI Order explained, the agency periodically requests that rail carriers provide TIH traffic information, and such information would be "of particular use and interest to a terrorist," particularly to the extent it included "details concerning the quantities and types of products[,] shippers and receivers of the commodities[,] and the times and routes of the movements." *Id.* at 2-3. Pursuant to that finding,

⁴ For the Board's reference, copies of complainants' primary discovery requests encompassing TIH traffic event records, hazardous materials routing analyses submitted to federal agencies, and PTC implementation plans, excerpted from Complainants' discovery requests, are attached to this letter. *See* Exhibit 2 (DuPont request excerpts); Exhibit 3 (SMEPA request excerpts).

⁵ DOT agencies sometimes refer to TIH commodities, Divisions 1.1, 1.2, and 1.3 explosives and Class 7 highway controlled radioactive material collectively as "Sensitive Security Materials."

Director Rachel D. Campbell

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FRA designated as SSI all traffic information submitted to FRA relating to TIH commodities (as defined in 49 C.F.R. § 171.8). *See id.* at 4.⁶

By its terms, the FRA SSI Order does not specifically apply to TIH traffic information in a railroad's possession that has not been submitted to FRA. However, based upon previous consultations with FRA staff (conducted for purposes of developing internal policies and guidelines for complying with SSI regulations), NS has determined that its internal TIH traffic information that is otherwise within the scope of the FRA description is SSI, regardless of whether that information has been provided to FRA. Accordingly, in its normal course of business, NS treats its own internal TIH traffic information in accordance with the requirements and limitations prescribed by SSI regulations.

NS reiterates that it recognizes how important detailed car event data is to a SAC case, and that its sole objection to production of that data is that it contains SSI that may not be disclosed except to authorized persons (who themselves must comply with restrictions on the use and distribution of SSI). NS is prepared to begin production of such traffic data once it is properly authorized to do so, and receives adequate assurances that such production (and use of this information as rate case evidence) will not violate its obligations under governing SSI law, rules, and regulations.

Hazardous Materials Routing Studies and Analyses Prepared for FRA

Complainant DuPont has asked for "any documents, reports, analyses, or studies provided to any Federal or state agencies which discuss or describe NS' compliance with regulations for handling, routing or proposed routing of hazardous materials." *See* DuPont RFP 70; *see also* DuPont RFP 151 (posing same request for NS affiliates TCS and TDIS). This request appears to be directed at the annual "[r]ail transportation route analysis" NS performs pursuant to Section 1551 of the 9/11 Commission Act (Pub L. No. 110-53) (codified at 6 U.S.C. § 1201) and 49 C.F.R. § 172.820. Section 172.820 requires rail carriers transporting certain hazardous materials to prepare an annual "[r]ail transportation route analysis" of safety and security risks on corridors in which such materials are handled and to use that routing analysis to select the route for moving covered materials. *See* 49 C.F.R. § 172.820 at (c) & (e). When promulgating this regulation, PHMSA made clear that "[t]he route selection documentation and underlying data will qualify as sensitive security information (SSI), will be handled in accordance with the SSI regulations at 49 C.F.R. Parts 15 and 1520, and may distributed only to 'covered persons' with a 'need to know.'" *Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments*, 73 Fed. Reg. 72182,

⁶ TIH traffic data is thus information designated as SSI pursuant to 49 C.F.R. § 15.5(b)(16).

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72187 (2008).⁷ As the FRA summarized in a companion Rule issued the same day (responding to requests that SSI be released to interested third parties, such as shippers):

Because the railroad carriers' commodity data, route analyses, and conference record will contain sensitive information with a distribution limited by statute and regulation, it cannot be made available for review or comment to outside parties. To allow the detailed railroad routing information to be released to parties beyond authorized government officials and the railroad itself would defeat the purpose of the 9/11 Commission Act, and the PHMSA Final Rule: To make railroad transportation of security sensitive hazardous materials safer and more secure.

Railroad Safety Enforcement Procedures: Enforcement, Appeal, and Hearing Procedures for Rail Routing Decisions, FRA Final Rule, 73 Fed. Reg. 72914, 72917 (Nov. 26, 2008) (emphasis added). This clear FRA statement, and its reasoning and purpose, would also appear to apply with equal force to the disclosure of similarly detailed routing information maintained by rail carriers.

There is no question that DuPont RFP 70 calls for production of SSI. As SSI, that information cannot be produced to DuPont's counsel or consultants without an authoritative determination that they are "covered persons" who have a "need to know" within the meaning of governing regulations.⁸

Positive Train Control Implementation

The rate case complainants have posed several requests related to Positive Train Control implementation that call for production of SSI. For example, DuPont requested "an unredacted and fully executed copy of NS' Positive Train Control Implementation Plan filed with the Federal Railroad Administration as required by 49 C.F.R. § 236.1009(a) and § 236.1011." DuPont RFP 144; *see* SMEPA RFP 74. Several portions of NS's Positive Train Control Implementation Plan ("PTCIP") were redacted on the grounds that they contain "security sensitive information within the meaning of 49 C.F.R. Section 15.5." Lisa Wilson Transmittal

⁷ *See also* 49 C.F.R. § 172.820(e) (requiring rail carriers to "restrict the distribution, disclosure, and availability of information contained in the route analysis to covered persons with a need-to-know, as described in parts 15 and 1520 of this title").

⁸ Complainant SMEPA has not requested information concerning NS' hazardous materials security and routing plans.

Director Rachel D. Campbell
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Letter for version 1.3 of NS PTCIP, at 1, Docket FRA – 2010-0060 (filed July 9, 2010). The redacted SSI information includes sections discussing risk factors, risk analysis, and risk prioritization. *Id.* Complainants' requests for an "unredacted" version of the PTCIP thus directly implicate SSI. In addition, it is possible that some of the information in NS's possession responsive to complainants' requests for "all studies, analyses, detailed plans and estimates developing NS' estimated costs to design, install and maintain the Positive Train Control system" described in the PTCIP will also constitute SSI. *See* DuPont RFP 145.

Other Requests That Potentially Implicate SSI

The three most significant types of discovery requests propounded in these cases that call for production of SSI are detailed above. However, a number of complainants' other discovery requests may implicate some SSI. For example, several DuPont requests directly ask for information on NS's security procedures. *See, e.g.*, DuPont Interrogatories 7(i), 13(f), 15(d), and 17(f); DuPont RFP 110. While NS will make an effort to respond to these requests without revealing SSI, it is possible that some responsive information will implicate SSI. *See* 49 C.F.R. § 15.5 (1, 8, 10, 13) (SSI includes "security programs and contingency plans," "security measures," "security training materials," and "systems security information"). Similarly, a number of DuPont discovery requests call for information on handling of hazardous materials. *See, e.g.*, DuPont Interrogatory 7(c); DuPont RFPs 99, 100, 153, 154. And, a few additional SMEPA requests may implicate SSI. *See, e.g.*, SMEPA Interrogatory 10(c), RFP 26.

NS is presently in the process of gathering and reviewing information potentially responsive to these requests, and it will promptly advise complainants if it identifies otherwise relevant and responsive information that contains SSI.⁹ While NS believes that it likely will be able to respond to most of these requests without revealing SSI, it is possible that some information in NS's possession responsive to these requests may include SSI.

* * * *

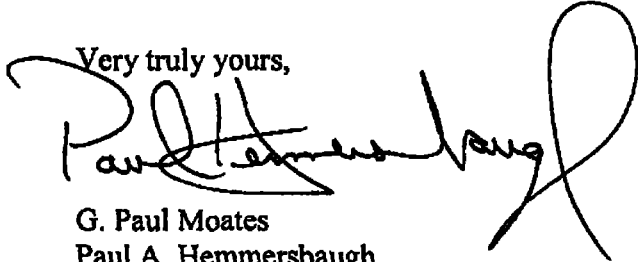
We hope that the foregoing summary of the DuPont and SMEPA discovery requests that implicate SSI is helpful to the Board, and we appreciate the Board's willingness to work with

⁹ Because traffic data is important to the development and submission of SAC evidence, NS decided to bring this specific SSI (along with requests for routing and security plans and unredacted PTC implementation plans) question to the attention of the Board and the parties immediately, so it could be resolved expeditiously and without unduly impeding the progress of the rate cases. The other requested information that could potentially contain SSI, which NS is presently reviewing, is less likely to be central to a SAC analysis.

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Page 8

FRA and TSA to resolve these issues. If you have questions, please contact the undersigned.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul Hemmersbaugh", with a large, stylized loop at the end.

G. Paul Moates
Paul A. Hemmersbaugh

cc: Jeffrey Moreno
Kelvin Dowd
Craig Keats
William Brennan
Valerie Quinn

Kelvin Dowd

From: Hemmersbaugh, Paul A. [phemmersbaugh@sidley.com]
Sent: Thursday, April 07, 2011 2:14 PM
To: Craig.Keats@stb.dot.gov
Cc: Moreno, Jeffrey; Kelvin Dowd; Moates, G. Paul
Subject: NS Position Concerning Production of SSI in STB Dkt Nos. 42125 and 42128.

All,

After consideration, NS has determined it is unable to rely on a letter from STB staff as sufficient to authorize NS to produce data that may constitute Sensitive Security Information under the regulations and policies of the FRA, TSA, PHMSA, or other cognizant agencies. Absent an order from the Surface Transportation Board or express authorization from FRA, TSA, or other agencies having jurisdiction over the question, NS will not produce traffic event records for movements of the commodity categories the parties have previously discussed (primarily TIH, certain explosive materials, and radioactive materials).

Regards,

Paul Hemmersbaugh

Paul Hemmersbaugh
Sidley Austin, LLP
(202) 736-8538
phemmersbaugh@sidley.com

-----Original Message-----

From: Craig.Keats@stb.dot.gov [<mailto:Craig.Keats@stb.dot.gov>]
Sent: Thursday, April 07, 2011 1:59 PM
To: Hemmersbaugh, Paul A.
Cc: Moreno, Jeffrey; Kelvin Dowd; Moates, G. Paul
Subject: Re: Brief conversation with Craig Keats

Gentlemen, we are going into a meeting for an hour or so. Leave messages if you need us. CK

IRS Circular 230 Disclosure: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this communication, including attachments, was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding any penalties that may be imposed on such taxpayer by the Internal Revenue Service. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addressed in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

This e-mail is sent by a law firm and may contain information that is privileged or
confidential.
If you are not the intended recipient, please delete the e-mail and any attachments and
notify us immediately.

Kelvin Dowd

From: Craig.Keats@stb.dot.gov
Sent: Friday, April 08, 2011 2:09 PM
To: roberta.stewart@dot.gov
Cc: andy.corcoran@nscorp.com; Bob.Ross@dot.gov; Doug.Blair@dhs.gov; Holly.Dickens@dhs.gov; phemmersbaugh@sidley.com; Kelvin Dowd; William.Brennan@stb.dot.gov; Valerie.Quinn@stb.dot.gov; Moreno, Jeffrey
Subject: Re: SSI in STB rate cases

Roberta, assuming that the Government is open, we will be available every day next week except for Friday. On Tuesday, the only times that will work for me are 10:30 til 12 and 3:00 til COB. I will forward this note to Kelvin Down and Jeff Moreno, who represent the shippers in the proceeding before the Board. Jeff and Kelvin, please respond to Roberta. Thanks.
Craig

From: <roberta.stewart@dot.gov>
To: <Bob.Ross@dot.gov>, <Doug.Blair@dhs.gov>, <Craig.Keats@stb.dot.gov>, <phemmersbaugh@sidley.com>
Cc: <andy.corcoran@nscorp.com>, <Holly.Dickens@dhs.gov>
Date: 04/08/2011 01:57 PM
Subject: SSI in STB rate cases

Good afternoon:

I think I have spoken to everyone on this e-mail regarding the issue of whether certain information being requested in discovery in STB rate cases contains SSI, and if so, how that information should be handled by the parties and STB.

It seems that we (DOT and TSA staff who deal with SSI) still do not adequately have a handle on what the specific information is that is being requested in particular rate cases, and whether it contains SSI. We sincerely want to understand this so that we can give STB and parties to rate cases a framework and plan for handling SSI issues in the cases currently at issue and in all future cases.

Accordingly, I suggest we have a meeting with all of the involved parties (i.e. DOT, TSA, STB, the parties to the rate case and/or their representatives) to clarify this issue. An in-person meeting would, of course, be ideal, but a conference call would be better than nothing.

I know there is substantial uncertainty as to whether the Federal government parties will be working next week, but I thought I'd try to just schedule something anyhow. At worst, the government is shut down, and we have to reschedule.

So, could all of you please e-mail me back with your availability for a meeting or conference call next week? Also, I do not have the contact information for all of the parties to the rate cases and their representatives. Craig, could you communicate with the other folks who need to be involved?

Many thanks.

Roberta J. Stewart
Attorney
Federal Railroad Administration
1200 New Jersey Ave. SE
Washington, DC 20590
Tel: 202-493-6027
Fax: 202-493-6068
BlackBerry: 202-657-9507
roberta.stewart@dot.gov

Kelvin Dowd

From: roberta.stewart@dot.gov
Sent: Thursday, April 28, 2011 12:49 PM
To: Kelvin Dowd
Cc: Jeff.Moreno@thompsonhine.com; pmoates@Sidley.com; phemmersbaugh@sidley.com; Craig.Keats@stb.dot.gov; William.Brennan@stb.dot.gov; Valerie.Quinn@stb.dot.gov; Christopher A. Mills; jeff@jacksonfirm.com
Subject: RE: STB Docket No. 42128, South Mississippi Electric Power Association v. Norfolk Southern Railway Company

Mr. Dowd-

Thank you for your e-mail, and I apologize for the delay. I am waiting on concurrence on this issue from the Office of the Secretary. I have forwarded your e-mail to that office, and asked for a timeline. I will get back to you as soon as I know anything, and I apologize again for the delay.

Roberta J. Stewart
Attorney
Federal Railroad Administration
1200 New Jersey Ave. SE
Washington, DC 20590
Tel: 202-493-6027
Fax: 202-493-6068
BlackBerry: 202-657-9507
roberta.stewart@dot.gov

From: Kelvin Dowd [<mailto:kjd@sloverandloftus.com>]
Sent: Thursday, April 28, 2011 12:42 PM
To: Stewart, Roberta (FRA)
Cc: Jeff.Moreno@thompsonhine.com; Moates, G. Paul; phemmersbaugh@sidley.com; Keats, Craig (STB); Brennan, William (FRA); Valerie.Quinn@stb.dot.gov; Christopher A. Mills; 'jeff@jacksonfirm.com'
Subject: STB Docket No. 42128, South Mississippi Electric Power Association v. Norfolk Southern Railway Company

Dear Ms. Stewart:

On behalf of the Complainant in the referenced litigation, I am writing to inquire as to the status of the notice which was to be published by FRA/DHS, concerning the production of essential traffic data which has been requested by SMEPA in discovery but has been withheld from production by NS based on the carrier's view that it contains Sensitive Security Information as described in 49 CFR Part 1520. It is not disputed that the traffic data in question is relevant to core issues raised by SMEPA's Complaint before the STB, or that its production is a foundational key to the preparation of SMEPA's evidence under the STB's Coal Rate Guidelines. Indeed, SMEPA's counsel and expert consultants are unable to progress with the development of that evidence to any meaningful degree in the absence of complete NS traffic data.

At the conclusion of the meeting of interested parties which you hosted on April 13, counsel were advised that FRA/DHS planned to issue a notice or other publication clarifying that the data in question could be produced in this litigation, subject to suitable protections to safeguard confidentiality and limit disclosure (which already are in place), and that such production would not be inconsistent with federal regulations governing SSI. At the time, it was estimated that this clarification would issue within approximately one week after the meeting. As two weeks now have passed and our case continues to be governed by a procedural schedule with strict deadlines for the close of discovery and the filing of evidence, we respectfully request an update as to the anticipated date of publication.

Thank you for your consideration and assistance in this matter.

Sincerely,

Kelvin Dowd
Counsel for South Mississippi Electric Power Association

Kelvin J. Dowd
Slover & Loftus, LLP
1224 Seventeenth Street, NW
Washington, DC 20036
202.347.7170
202.347.3619 (fax)
kjd@sloverandloftus.com

Kelvin Dowd

From: Kelvin Dowd
Sent: Wednesday, July 06, 2011 1:27 PM
To: 'roberta.stewart@dot.gov'
Cc: 'jeff@jacksonfirm.com'; Jeff.Moreno@thompsonhine.com; Craig.Keats@stb.dot.gov; William.Brennan@stb.dot.gov; Valerie.Quinn@stb.dot.gov; Moates, G. Paul; Hemmersbaugh, Paul A.
Subject: STB Docket No. 42128, South Mississippi Electric Power Association v. Norfolk Southern Railway Company

Dear Ms. Stewart:

On behalf of South Mississippi Electric Power Association, Complainant in the referenced maximum rail rate proceeding pending before the Surface Transportation Board, we respectfully request that FRA/DHS act immediately to clear the way for production by Defendant Norfolk Southern Railway Company of essential rail traffic data that NS thus far has withheld from production on grounds that it may contain Sensitive Security Information as described in 49 C.F.R. Part 1520. This matter has been before the agencies for more than 90 days, during which time SMEPA has been deprived of access to indisputably relevant evidence that goes to the core of the administration and application of the STB's Coal Rate Guidelines. The integrity of the governing procedural schedule is now threatened, and SMEPA's member cooperatives and their consumers – who are among the poorest residents of the most economically challenged State in the country – are continuing to bear the burden of the challenged rail rates with no progress in the prosecution of their case.

When, over SMEPA's objection, NS' claim regarding SSI was referred for consideration by FRA and DHS, we were assured that the referral would not lead to undue procedural delay, and that an easy path existed to clarify that NS could produce the data in question in this litigation, subject to appropriate conditions to maintain confidentiality and limit disclosure, consistent with the federal regulations applicable to the handling of actual SSI. When we subsequently inquired as to the status of the matter on April 28, 2011, we were given to understand that a published notice or other written communication resolving the issue would be forthcoming shortly. Some ten (10) weeks have now passed since that inquiry, and the parties continue to await action. We appreciate the efforts that you and your colleagues have expended, and we understand that FRA did not initiate this controversy. Inasmuch as its resolution appears now to be in the hands of the agency, however, on behalf of our client we are compelled to press for that resolution as promptly as possible.

Thank you for your consideration, and please do not hesitate to contact the undersigned if there is any further action that we can take to expedite the conclusion of this matter.

Sincerely,

Kelvin J. Dowd
Counsel for South Mississippi Electric Power Association

Kelvin J. Dowd
Slover & Loftus, LLP
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Washington, DC 20036
202.347.7170
202.347.3619 (fax)
kid@sloverandloftus.com

230545

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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E.I. DUPONT DE NEMOURS AND COMPANY

Complainant,

v.

Docket No. NOR 42125

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

**DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO
COMPLAINANT'S MOTION TO MODIFY PROCEDURAL SCHEDULE**

Defendant Norfolk Southern Railway Company ("NS") hereby responds to Complainant E.I. Du Pont De Nemours and Company's ("DuPont's") Motion of June 30, 2011 to Modify Procedural Schedule ("Motion") in the above-captioned proceeding. NS does not oppose the Motion, but responds to clarify two points raised by DuPont.

First, DuPont correctly notes that NS has not yet produced the traffic data requested by DuPont during discovery because of concerns that those traffic files (which contain detailed information about the routing of toxic-by-inhalation ("TIH") and other hazardous commodities) contain Sensitive Security Information ("SSI"). DuPont asserts that "a solution satisfactory to DuPont and NS" was reached following an April 13, 2011 meeting between DuPont, NS, the Board, and the Department of Transportation, and that this solution "requires a decision from the FRA." While this is partially correct, NS wishes to clarify that the consultations referenced by DuPont included the Transportation Security Administration ("TSA") and NS has requested not only a decision from FRA (which we understand will be based upon FRA's consultations with TSA) but also an order from the Board advising the parties that based upon consultations with


FRA and TSA, NS may produce its traffic data as "Highly Confidential" information consistent with SSI regulations.

Second, with regards to the timing of the production of traffic data, NS interprets the use of the word "immediately" to mean that NS will be prepared to produce the traffic data promptly upon the issuance of an appropriate Board order. NS notes that while the traffic records at issue here are voluminous, NS stands ready to begin production as soon as it receives governmental authorization to do so.

Finally, NS asks that if the Board grants DuPont's Motion, its Decision make clear that discovery is being extended for both parties, and not just for the Complainant.

Respectfully submitted,

James A. Hixon
John M. Scheib
David L. Coleman
Christine I. Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510


G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Hanna M. Chouest
Marc A. Korman
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to Norfolk Southern Railway Company

Dated: July 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2011, I caused a copy of the foregoing Reply to Complainant's Motion to Modify Procedural Schedule to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno
Sandra L. Brown
Jason Tutrone
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036



Eva Mozena Brandon



SIDLEY AUSTIN LLP
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SYDNEY
TOKYO
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FOUNDED 1866

July 13, 2011

By Email and First Class Mail

Kelvin J. Dowd
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Re: South Mississippi Electric Power Association v. Norfolk Southern Railway
Company, STB Docket No. NOR 42128

Dear Counsel:

We write in response to Complainant South Mississippi Power Association's ("SMEPA's") transmission of proposed operating characteristics for 15 mines potentially at issue in the above-referenced rate case. See K. Dowd Letter to P. Moates et al (July 8, 2011). The procedural schedule issued by the Board targeted July 15, 2011 for the parties' joint submission of operating statistics (*i.e.* the nine inputs used to determine URCS costs in rail rate cases). After the Board's issuance of that procedural schedule, however, Federal Railroad Administration ("FRA") and the Transportation Security Administration have undertaken a review of certain data – most prominently including Norfolk Southern ("NS") traffic and event data (which contains Sensitive Security Information, or "SSI") – to determine if and under what conditions NS may produce that information in this rate case and how and under what conditions it may be used in evidence submitted in the case. While those agencies are presently analyzing and considering the question, they have not yet issued a ruling or order concerning whether NS traffic and event data may be produced or used in a rate case.

Accordingly, although NS has developed traffic and event data for production to SMEPA, it has not yet been authorized to produce that data. As we advised you, NS believes it makes sense for the joint submission of operating characteristics to the Board to be deferred until after NS is authorized to produce traffic and event files and data, because the best and most accurate information regarding the characteristics resides in those files. SMEPA ignored that suggestion and NS's request for SMEPA's view on that suggestion, and instead sent SMEPA's proposed operating characteristics for 15 mine origins to NS. *See id.* Below, we address the proposed operating characteristics that SMEPA submitted, and the numerous origins and lanes

Kelvin J. Dowd
Daniel M. Jaffe
July 13, 2011
Page 2

potentially covered by its Complaint, for which SMEPA has submitted no proposed operating characteristics.

I. The Fifteen Selected Mine Origins for Which SMEPA Generated Proposed Operating Characteristics.

Last Friday, SMEPA sent proposed operating characteristics for 15 selected mine origins located in the NS districts listed in the Complaint. *See* Dowd Letter Attachment No. 1 (July 8, 2011). SMEPA originated coal from only 5 of those fifteen mines in 2010. Based on 2010 data, SMEPA did not originate coal shipments to the issue plant from 10 of the 15 mines, or two-thirds of the mines for which it has proposed operating characteristics. Among other things, the fact that the majority of mines for which SMEPA proposes operating characteristics have not shipped coal to the issue plant illustrates one of the problems of attempting to develop operating characteristics without the traffic files that contain that actual data.

NS reiterates that it believes the better and more reasonable course would be for the parties to defer exchange of proposed operating characteristics until after NS has been authorized to produce the relevant traffic and event data. To avoid any suggestion by SMEPA that NS is seeking to delay the progress of this case, however, NS is submitting with this letter preliminary proposed operating characteristics for the 15 mine origins covered by SMEPA's July 8 proposal. *See* Attachment hereto. By submitting these preliminary operating characteristics, NS is not conceding that any origin from which SMEPA has not originated traffic is a proper subject of a rail rate challenge. Rather, NS reserves all rights to challenge the inclusion of any origins or lanes in this case.

For the five mines from which SMEPA did move traffic (Biggs, Benedict, Pardee, Steer Branch, and Toms Creek), NS used its 2010 traffic and event files to determine the nine operating characteristics. For the 10 mines from which SMEPA did not move traffic, NS used other data, information, and analyses to develop the preliminary proposed operating characteristics set forth in the Attachment. While NS presently believes these preliminary data to be accurate and appropriate estimates, it reserves the right to revise those parameters based on additional information or changes in relevant circumstances.

You will note that the parties are in general agreement as to seven of the nine operating characteristics used as inputs to the URCS Phase III process. *See* Attachment. With respect to two characteristics – tons per car and cars per train—the parties' proposals diverge. *See id.* If SMEPA is agreeable to using NS's proposed characteristics for those two operating parameters, the parties could submit those characteristics to the Board – subject to NS's reservations of rights set forth above – as their initial "Joint Submission of Operating Characteristics." If SMEPA

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does not agree with NS's proposed characteristics for those two parameters, the parties could submit to the Board the seven inputs on which they are in agreement, accompanied by each party's proposed characteristics for the two inputs on which they disagree. Please advise us at your earliest opportunity how SMEPA wishes to proceed with respect to the operating characteristics for the 15 mine origins included in SMEPA's July 8 proposal.

II. Operating Characteristics for the Additional 150-plus Origins Potentially Subject to SMEPA's Complaint.

SMEPA has proposed operating characteristics for less than 10 percent of the origins in the seven origin districts listed in its Complaint. *See* Complaint ¶ 11. For the overwhelming majority of those approximately 167 origins, SMEPA has proposed no operating characteristics at all. SMEPA has provided no explanation of its exclusion of nearly 94 percent of all origins included in its Complaint. However, it seems there are at least two likely candidate explanations. First, it may be that SMEPA intends to challenge NS rates from the 15 mine origins included in its July 8 letter only, and will not challenge rates from any other origins in the districts enumerated in its Complaint. If that is the case, please advise NS that this is SMEPA's intention.

Second, it may be that SMEPA intends to defer determination of which rates (*i.e.* from which origins) it intends to challenge until it has an opportunity to review the traffic and revenue files that cannot be produced until TSA and FRA issue a ruling on whether, consistent with their SSI regulations, requirements, and policies, NS may produce those files to SMEPA in this case. In that event, SMEPA presumably intends to submit additional proposed operating characteristics for any additional rates it intends to challenge after it reviews the traffic data. As there are at least 167 origins that potentially fall within the ambit of the Complaint, delay of submission of operating characteristics for lanes whose rates SMEPA is challenging seems reasonable. This further shows the wisdom of deferring the submission of operating characteristics for all lanes (including the 15 lanes SMEPA included in its July 8 proposal) until both parties have an opportunity to review and analyze the best and most authoritative source of most of this data, NS traffic and event files.

Because SMEPA has not proposed operating characteristics for movements originating at any of the numerous other origins potentially implicated by the Complaint, it would be speculative and a waste of NS resources for it to attempt to identify additional lanes whose rates SMEPA may decide to challenge. Accordingly, NS will not propose operating characteristics for additional origins at this time. Of course, NS reserves its rights to submit operating characteristics and any other relevant evidence or argument concerning additional origins and lanes, should SMEPA seek to expand its challenge.



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After you have an opportunity to review this letter and attachment, please advise us how SMEPA wishes to proceed with respect to the joint submission of operating characteristics, which under the existing procedural schedule, are to be filed on or before this Friday, July 15. If you wish to discuss this, please contact the undersigned.

Very Truly Yours,

A handwritten signature in black ink, which appears to be "Paul A. Hemmersbaugh". The signature is written in a cursive style with a large, looping "P" and a long, sweeping "H".

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren

Cc: Jeff C. Bowman

NS Operating Characteristics Attachment

Norfolk Southern Phase III Nine Inputs for Various NS Coal Origins to SMEPA's R.D. Morrow Station in Richburg, MS

Inputs	Lone Mountain 1-20025 St. Charles District Benedict, VA <u>SMEPA</u> NS	Blackberry Creek-1635 Thacker I District Thomas, KY <u>SMEPA</u> NS	Ben Creek-1865 Thacker I District Timbar, WV <u>SMEPA</u> NS	Jamboree-1895 Thacker I District Jamboree, KY <u>SMEPA</u> NS	Big Creek-1885 Thacker II District Biggs, KY <u>SMEPA</u> NS
1. Railroad					
2. Loaded Miles	730.4	833.4	813.0	832.4	807.4
3. Shipment Type	Local	Local	Local	Local	Local
4. Number of Cars	103.0	102.9	102.9	102.9	103.2
5. Tons per Car	113.7	117.7	117.7	117.7	118.1
6. Commodity	Coal	Coal	Coal	Coal	Coal
7. Type of Movement	Unit Train	Unit Train	Unit Train	Unit Train	Unit Train
8. Car Ownership	Private	Private	Private	Private	Private
9. Type of Car	General Service Hopper	General Service Hopper	General Service Hopper	General Service Hopper	General Service Hopper

NS Operating Characteristics Attachment

Norfolk Southern Phase III Nine Inputs for Various NS Coal Origins to SMEPA's R.D. Morrow Station in Richburg, MS

Inputs	Tom's Creek Dock-2824 Clinch Valley District Toms Creek, VA <u>SMEPA</u> NS	Plant #1-21007 Interstate District Wentz, VA <u>SMEPA</u> NS	Pardee Surface-21012 Interstate District Pardee, VA <u>SMEPA</u> NS	Steer Branch-21039 Interstate District Steer Branch, VA <u>SMEPA</u> NS	Long Fork-596 Kenova District Gund, KY <u>SMEPA</u> NS
1. Railroad					
2. Loaded Miles	721.1	713.8	719.1	737.9	856.6
3. Shipment Type	Local	Local	Local	Local	Local
4. Number of Cars	102.5	102.9	102.9	102.8	102.9
5. Tons per Car	119.6	117.7	116.7	116.7	117.7
6. Commodity	Coal	Coal	Coal	Coal	Coal
7. Type of Movement	Unit Train	Unit Train	Unit Train	Unit Train	Unit Train
8. Car Ownership	Private	Private	Private	Private	Private
9. Type of Car	General Service Hopper	General Service Hopper	General Service Hopper	General Service Hopper	General Service Hopper

NS Operating Characteristics Attachment

Norfolk Southern Phase III Nine Inputs for Various NS Coal Origins to SMEPA's R.D. Morrow Station In Richburg, MS

Inputs	Ragland Complex-476 Kenova District Scarlet Glen, WV <u>SMEPA</u> NS	Martiki-766 Kenova District Martiki, KY <u>SMEPA</u> NS	Sidney Coal-816 Kenova District Sidney, KY <u>SMEPA</u> NS	Pontiki-826 Kenova District Pontiki, KY <u>SMEPA</u> NS	Sandlick-886 Kenova District Sand Lick, KY <u>SMEPA</u> NS
1. Railroad					
2. Loaded Miles	876.4	866.9	861.5	871.4	854.0
3. Shipment Type	Local	Local	Local	Local	Local
4. Number of Cars	102.9	102.9	102.9	102.9	102.9
5. Tons per Car	117.7	117.7	117.7	117.7	117.7
6. Commodity	Coal	Coal	Coal	Coal	Coal
7. Type of Movement	Unit Train	Unit Train	Unit Train	Unit Train	Unit Train
8. Car Ownership	Private	Private	Private	Private	Private
9. Type of Car	General Service Hopper	General Service Hopper	General Service Hopper	General Service Hopper	General Service Hopper



Debt Service Invoice

Corporate Trust Services

Name of Issue:
SMEPA FIRST MORTGAGE OBLIGATIONS, SERIES
2010A&B NOTES

Account Number: 144965000
Debt Service Date: 06/09/2011
Payment Due Date: 06/09/2011
Page: 1 of 1

SMEPA
ATTN: RAYMOND HALEY
P.O. BOX 15849

HATTIESBURG MS 39404-584

Maturity Date	Rate	Principal Outstanding	Accrual Start Date	Accrual End Date	Interest Due	Principal Due	Call Premium
12/09/2030	4.08%	40,000,000.00	12/09/2010	06/08/2011	816,000.00	0.00	0.00
12/09/2040	5.40%	110,000,000.00	12/09/2010	06/08/2011	2,970,000.00	0.00	0.00
Totals		150,000,000.00			3,786,000.00	0.00	0.00

Total Amount Due:	\$3,786,000.00
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Wire instruction:
(must be received by 11:30am central time on due date)
BBK: U.S. Bank N.A. (091000022)
BNF: U.S. Bank Trust N.A.
AC: 180120521620
OBI: TFM
REF: 144965000
For questions contact: GREGORY JACKSON 704-335-4590

Please Remit with Payment

Name of Issue:
SMEPA FIRST MORTGAGE OBLIGATIONS, SERIES
2010A&B NOTES

Account #	144965000
Debt Service Date:	06/09/2011
Payment Due On:	06/09/2011
Net Amount Due:	\$3,786,000.00
Amount Enclosed:	

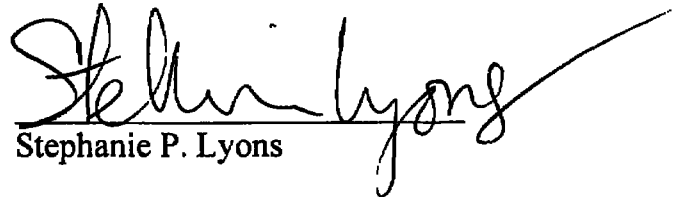
Remit check to: (must be received 5 business days prior to due date)
US Bank
CM-9705
PO Box 70870
St. Paul, MN 55170-9705

Change of Address:

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2011, I caused a copy of the foregoing First Motion To Compel Discovery to be served by hand delivery and email on counsel for the Defendant, as follows:

G. Paul Moates, Esq.
Paul A. Hemmersbaugh, Esq.
Matthew J. Warren, Esq.
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005


Stephanie P. Lyons